SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~650~~ 18

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 283, PETITIONER,

vs.

RUSSELL SCOFIELD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 22, 1965

[fol. A] [File endorsement omitted]

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL, Petitioners,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR REVIEW OF FINAL ORDER OF NATIONAL LABOR RELATIONS BOARD—Filed June 26, 1964

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Russell Scofield, Lawrence Hansen, Emil Stefanec and George Kozbiel (referred to herein as the Petitioners), are aggrieved by and respectfully petition this honorable Court to review and set aside the order of the National Labor Relations Board (referred to herein as the Board), dated May 18, 1964, denying the motion of the Petitioners for reconsideration of the decision and order of the Board dated January 17, 1964 in proceedings entitled, Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corporation) and Russell Scofield, an individual, Lawrence Hansen, an individual, Emil Stefanec, an individual, George Kozbiel, an individual, Cases Nos. 13-CB-1059-1 through 4, and in support thereof represent and show that:

[fol. 2]

I

This Court has jurisdiction of the subject matter hereof by virtue of Section 10(f) of the National Labor Relations Act, as amended, 61 Stat. 136 (referred to herein as the Act).

II

The Petitioners are individuals residing in Milwaukee, Wisconsin, and the alleged unfair labor practices which are the subject of this Petition were engaged in at Milwaukee, Wisconsin, within this judicial district.

III

The Petitioners are employees of Wisconsin Motor Corporation and are employed at the manufacturing plant of that company in Milwaukee, Wisconsin. Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO (referred to herein as the Union), is the certified collective bargaining agent for the production employees at the Milwaukee plant including the Petitioners. In April, 1961, following a trial conducted by the Union, the Petitioners were each fined by the Union for having violated an alleged union rule imposing production quotas or limitations upon the earnings of employees paid on an incentive basis. In October, 1961, the Union brought suit in a state court to recover the amount of the fines thus imposed. These suits are still pending.

IV

Upon charges filed by the Petitioners, the General Counsel for the Board issued an amended consolidated complaint dated December 11, 1961, alleging that the acts of the [fol. 3] Union in fining the Respondents and bringing civil suits for the collection of such fines constituted unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act. After hearing and an intermediate report by a trial examiner the Board delegated its powers in connection with the case to a three-member panel consisting of Frank W. McCulloch, John H. Fanning and Gerald A. Brown. By decision and order dated January 17, 1964, the Board ruled that the action of the Union did not violate Section 8(b)(1)(A) of the Act and the complaint was ordered dismissed.

V

The Petitioners seek the relief requested herein on the following grounds:

1. The Petitioners, in refusing to abide by the alleged union rule limiting the amount they could earn as incentive workers, were exercising the right guaranteed by Section 7 of the Act to refrain from concerted activities. The action of the Union in imposing and attempting to collect financial sanctions against the Petitioners for exercising such a right restrained and coerced them within the meaning of Section 8(b)(1)(A) of the Act and constituted unfair labor practices under the Act.

2. The ruling of the Board and the interpretation of the Act upon which it was based are directly contrary to the decision of this Court in the case of *Allen-Bradley Co.* v. *NLRB,* 286 Fed. 2d 442 where this Court held that the power of a union to prescribe rules relative to the acquisi-
[fol. 4] tion and retention of its members "goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act" and that "coercive action whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union".

Wherefore, the Petitioners respectfully request this honorable Court to assume jurisdiction herein and review the aforesaid proceedings and:

A. Direct the clerk of this Court to certify and serve a copy of this Petition upon the Board;

B. Direct the Board to certify and file in this Court the transcript of the entire record in the aforesaid proceeding;

C. Vacate and set aside the decision and order of the Board in the aforesaid proceeding in its entirety and order the Board to enter an order finding that the Union has committed unfair labor practices and granting appropriate relief; and

D. Grant such other and further relief as may be just and proper.

Signed at Milwaukee, Wisconsin, this 24th day of June, 1964.

Russell Scofield, Lawrence Hansen, Emil Stefanec and George Kozbiel, Petitioners, By Quarles, Herriott & Clemons, Their Attorneys, By John G. Kamps.

John G. Kamps, James Urdan, Quarles, Herriott & Clemons, 411 East Mason Street, Milwaukee, Wisconsin 53202.

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW—Filed August 6, 1964

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Comes now the National Labor Relations Board (herein called the Board) and pursuant to the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151 *et seq.*) files this answer to the petition for review of its Decision and Order dated January 17, 1964, in which an unfair labor practice complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, was dismissed in its entirety (Board Case No. 13-CB-1059).

1. The Board admits the allegations of paragraphs I and II of the petition for review which relate to jurisdiction, venue, and petitioners' standing.

2. The Board admits the allegations of paragraphs III and IV of said petition, except that the Board prays the Court's reference to the certified transcript of the record to be filed herein for a full and exact statement of the pleadings, testimony, evidence, findings of fact, conclusions of law, and order of the Board.

3. The Board denies each and every allegation of paragraph V of said petition.

[fol. 6] 4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were in all respects valid and proper.

5. Pursuant to Section 10(e) of the Act, the Board will certify and file with this Court the transcript of the entire record in the aforesaid proceeding before the Board.

Wherefore, the Board prays that this honorable Court cause notice of the filing of this answer and transcript to be served upon petitioner, take jurisdiction of the proceedings and the questions to be determined therein, and make and enter thereupon a decree denying all the request for relief contained in the petition for review.

Marcel Mallet-Prevost, Assistant General Counsel,
National Labor Relations Board.

Dated: August 4, 1964.

[fol. 7] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14698

SCOFIELD, et al., Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES—
Filed September 15, 1964

Now comes the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and moves to intervene in this proceeding and in support of said motion states as follows:

1. The Petitioner is the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, a labor union.

2. The Union was a respondent in the proceeding below before the National Labor Relations Board, in which the charges against the Union were ultimately dismissed by the Board. This dismissal is one of the alleged errors sought to be reversed by the Petitioner Scofield, an individual, whose status was that of a charging party below and is as the Petitioner in this Court. As Respondent below, the Union will be directly affected by any decision rendered by this Court and desires to be heard on the merits of the controversy.

3. The Union participated fully in the proceedings before the Board and believes that its own interest and the interests of justice require that it be permitted to partici-
[fol. 8] pate in this proceeding.

4. Counsel for the International Union, United Automobile, Aerospace and Agricultural Implement Workers

of America, AFL-CIO, has spoken with counsel for Petitioner Scofield and Respondent, National Labor Relations Board and can advise that both have consented orally to the allowance of our motion to intervene.

5. No delay will be occasioned since your Petitioner herein will file its brief within the time allotted to the Board under the Court's rules.

Wherefore, your Petitioner prays that leave be given to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, to intervene in these proceedings or, in the alternative, to permit the filing of a brief by this Petitioner, without prejudice to participation in the oral argument if permission is granted by the panel of Judges which hears the appeal, in accordance with an order entered by this Court in Ramsey v. NLRB, No. 14226, in a parallel situation.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, By Joseph L. Rauh, Jr., Stephen I. Schlossberg, and Harold A. Katz, their Attorneys.

Joseph L. Rauh, Jr., 1625 K Street, N.W., Washington 6, D. C.

Stephen I. Schlossberg, 8000 East Jefferson Avenue, Detroit, Michigan 48214.

Harold A. Katz, 7 South Dearborn Street, Chicago, Illinois 60603, ANdover 3-6330.

[fol. 9] Affidavit of Service (omitted in printing).

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. Latham Castle, Circuit Judge.

Petition for review of an order of the National Labor Relations Board.

No. 14698

RUSSELL SCOFIELD, et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ORDER DENYING THE PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES AND GRANTING MOTION FOR LEAVE TO FILE BRIEF, ETC.—September 16, 1964

On consideration of the motion of counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, for leave to intervene in this proceeding or alternatively for other relief, all parties having consented to the said petition,

It Is Hereby Ordered that leave be granted to said petitioner to file a brief in this cause as amicus curiae without leave to participate in the oral argument of this cause.

[fol. 11] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14698

RUSSELL SCOFIELD, et al., Petitioners,

—vs.—

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR RECONSIDERATION BY THE COURT EN BANC OR BY A DIVISION THEREOF OF ORDER DENYING PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES—Filed October 1, 1964

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283, hereinafter called United Automobile Workers) petitions this Court for reconsideration by the Court, either *en banc* or by a division thereof as provided for in 28 U.S.C. §46, of its *Petition To Intervene With Consent Of All Parties.* The said Petition was denied by the Honorable Latham Castle, Circuit Judge, sitting as motions judge pursuant to Rule 4 of the Rules of this Court. In support of this petition, the United Automobile Workers shows to the Court as follows:

1. The *Petition To Intervene With Consent Of All Parties* was filed on September 16, 1964. A true and correct copy thereof is attached hereto.

2. On September 16, 1964, the Honorable Latham Castle, Circuit Judge, entered an order denying the *Petition To Intervene With Consent Of All Parties* and granting leave to the United Automobile Workers to file a brief as amicus curiae and denying leave to participate in oral argument.

3. This proceeding is before the Court upon the petition of Russell Scofield, et al., to set aside the decision of the

National Labor Relations Board which dismissed a complaint charging the United Automobile Workers with viola-
[fol. 12] tion of §8(b)(1)(A) of the Labor-Management Relations Act of 1947, as amended, because it had fined certain members for exceeding incentive pay ceilings. In dismissing the complaint, the Board held essentially that the conduct of the United Automobile Workers was not within the scope of §8(b)(1)(A), and in addition, that Congress in enacting the proviso to §8(b)(1)(A) had refrained from regulating internal union affairs, as it had expressly preserved the right of a labor organization "to prescribe its own rules with respect to the acquisition or retention of membership therein . . . "

4. The decision of the Board dismissing the complaint against the Union was issued on January 17, 1964, and on May 18, 1964, the Board denied a motion for reconsideration thereof. The petition for review was filed in this Court on June 26, 1964. The Board's answer thereto was filed on August 6, 1964.

5. Thereafter on September 2, 1964, the Board released its decision in another case in which it appears to have modified or limited its view of the law as expressed in the case below. In *Local 138, International Union of Operating Engineers,* 148 NLRB No. 74, the Board held that a labor organization had violated §8(b)(1)(A) of the Act by fining members who had instituted administrative proceedings with the Board without having first exhausted internal union remedies for their complaints. While the Board's decision in the *Local 138* case expressly reaffirms and distinguishes the decision in the case at bar, *Local 138* nevertheless appears to be a modification by the Board, with respect to the interpretation and application of §8(b)(1)(A) of the Act and the proviso thereto, in cases involving internal union disciplinary action.

6. The petitioner, United Automobile Workers, has great respect for the National Labor Relations Board. The Board, however, in view of this recent decision may no longer be in a position to advocate with undivided heart its decision in favor of the United Automobile Workers in the

case below. The United Automobile Workers, respondent in that case, cannot and should not be compelled to rely [fol. 13] solely upon representation by the Board for protection of the Union's substantial interests herein. The circumstances are such that the United Automobile Workers should be allowed to defend its own position fully as an intervening party. Cf., *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768 (C.A.D.C.). An adverse decision in this Court would seriously affect the United Automobile Workers and its members, and might result in the United Automobile Workers and its members being deprived of substantial rights. The Board does not seek to protect private rights of the United Automobile Workers but only to vindicate public matters. In addition, the United Automobile Workers' internal rules and its general internal procedures will necessarily be involved in this Court's consideration and ultimate decision. The United Automobile Workers is entitled to be heard as of right upon substantial questions in this case which turn upon the interpretation of the internal rules by which it is governed. Many other local unions which are affiliated with the same international union may similarly be seriously affected in their internal government by an adverse decision in this case. Important private interests of the United Automobile Workers and its members are here involved. This is a case where "the enforcement of a public law also demands distinct safeguarding of private interests," which are "not left to the public authorities" solely. Cf., *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 505, quoted in *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768 (C.A.D.C.).

7. The United Automobile Workers should be permitted to intervene as a party herein in order to assure its status to seek review in the Supreme Court of the United States in the event of an adverse decision in this Court.[1] Otherwise, if the Board is not disposed to seek review in the [fol. 14] Supreme Court in the event of an adverse decision

[1] An intervenor has standing to seek Supreme Court review of a decree adverse to its beneficial interest in a Board order. *International Union of Mine, Mill and Smelter Workers* v. *Eagle Picher Mining and Smelting Co.*, 325 U.S. 335, 338, 339 (1945).

in this Court the United Automobile Workers will be deprived of an opportunity to obtain review of a decision which could involve serious consequences to the United Automobile Workers, including the local union herein and many other local unions as well.

8. The petitioner believes that the issue of the right of a party respondent in a Board proceeding to intervene as a party in review proceedings is of sufficient importance to warrant further review of that question by the Supreme Court of the United States. Before requesting such review, petitioner believes it only appropriate to first move this Court for full consideration *en banc* or by a division thereof of its petition to intervene.

9. We are aware that this Court has in other cases denied leave to intervene. However, in at least one recent case, *Ekco Products Company* v. *N.L.R.B.*, No. 12166, February 21, 1958, this Court upon reconsideration granted leave to intervene to a labor organization which had been the successful charging party in a case before the Board. In *Ekco* there had occurred a doctrinal shift by the Board following its initial decision under review; and there as here the union seeking intervention sought to protect its constitution and its other interests which were affected. The Court stated as follows:

> "The United Steelworkers of America, AFL-CIO, having petitioned for leave to intervene, and having represented that the National Labor Relations Board has, since its decision herein, shifted its position upon an issue which is of great importance to said Steelworkers in the case at bar, and generally, whenever that organization has representation contracts; and having further represented that an interpretation of the Constitution of the Steelworkers organization is likewise in issue in the case at bar
>
> "IT IS ORDERED that leave be granted to the United Steelworkers of America, AFL-CIO to intervene herein and to file its brief on or before ten (10) days from the date of this order, sending copies to the other parties herein."

The reasoning of this Court in *Ekco* in granting intervention to the charging party applies with at least equal if not greater force to this petitioner, which should not be left as a respondent with no opportunity to defend. A true and correct copy of this Court's order in *Ekco* is attached hereto.

[fol. 15] Wherefore, it is urged that this Court reconsider the *Petition To Intervene With Consent Of All Parties, en banc,* or by a division thereof, and grant said Petition.[2] If the *Petition* is granted, the petitioner will promptly file its brief as intervenor so that there will be no delay of the proceedings in this Court.

Respectfully submitted,

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283), By Joseph L. Rauh, Jr., Stephen I. Schlossberg, Harold A. Katz, Irving M. Friedman, Its Attorneys.

Joseph L. Rauh, Jr., 1625 K Street, N.W., Washington 6, D. C.

Stephen I. Schlossberg, 8000 East Jefferson Avenue, Detroit, Michigan 48214.

Harold A. Katz, Irving M. Friedman, 7 South Dearborn Street, Chicago, Illinois 60603, ANdover 3-6330.

[fol. 16] Certificate of Service (omitted in printing).

[fol. 17] CLERK'S NOTE

Attachment to Petition for reconsideration etc. "Petition to intervene with consent of all parties" is omitted from the record here as it appears at side folio 7, *supra.*

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[2] Counsel for the Board has authorized us to state that as a matter of policy, the Board does not oppose intervention by the party which was a respondent before the Board, in any review proceedings in courts of appeals.

[fol. 19]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Before: Hon. F. Ryan Duffy, Chief Judge, Hon. W. Lynn Parkinson, Circuit Judge.

Pet. for Rev. of an order of N.L.R.B.

No. 12166

EKCO PRODUCTS COMPANY, Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ATTACHMENT TO PETITION FOR RECONSIDERATION, ETC.—
February 21, 1958

The United Steelworkers of America, AFL-CIO, having petitioned for leave to intervene, and having represented that the National Labor Relations Board has, since its decision herein, shifted its position upon an issue which is of great importance to said Steelworkers in the case at bar, and generally, whenever that organization has representation contracts; and having further represented that an interpretation of the Constitution of the Steelworkers organization is likewise in issue in the case at bar

It Is Ordered that leave be granted to the United Steelworkers of America, AFL-CIO to intervene herein and to file its brief on or before ten (10) days from the date of this order, sending copies to the other parties herein.

[fol. 20]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. John S. Hastings, Chief Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Latham Castle, Circuit Judge.

Petition for review of an order of the National Labor Relations Board.

No. 14698

RUSSELL SCOFIELD, et al., Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent.

ORDER DENYING PETITION FOR RECONSIDERATION—
October 6, 1964

On consideration of the petition of the respondent in the above entitled proceeding, The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283), for reconsideration by the Court, either *en banc* or by a division thereof, of the order of this Court entered September 16, 1964, denying said respondent's petition to intervene in said proceeding;

It Is Hereby Ordered that the petition for reconsideration be and is hereby Denied.

[fol. 21] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 22]

SUPREME COURT OF THE UNITED STATES

No. 650—October Term, 1964.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (LOCAL 283), Petitioner,

vs.

RUSSELL SCOFIELD, et al.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, [redacted]-AFL-CIO, *Petitioner*, (Local 283)

v.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOSEPH L. RAUH, JR.,
JOHN SILARD,
HARRIETT R. TAYLOR,
STEPHEN I. SCHLOSSBERG,
1625 K Street, N.W.,
Washington 6, D. C.

HAROLD A. KATZ,
IRVING M. FRIEDMAN,
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606 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Attorneys for Petitioner.

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MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, *Petitioner,*

v.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, UAW-AFL-CIO, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Seventh Circuit denying petitioner leave to intervene in proceedings to review an order of the National Labor Relations Board.

Opinions Below

The decision and order of the National Labor Relations Board is reported at 145 NLRB No. 9. Without opinion, the court below denied leave to petitioner to intervene on September 16, 1964, and denied a petition for reconsideration of that action by order of October 6, 1964. These orders are printed in Appendix A, pp. 15 to 23, *infra*, together with the union's petition for intervention and petition for reconsideration of the order denying intervention.

Jurisdiction

The order of the United States Court of Appeals for the Seventh Circuit denying the union leave to intervene was entered on September 16, 1964 and a timely petition for reconsideration was denied by order of October 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

Question Presented

When the National Labor Relations Board dismisses an unfair labor practice complaint against a union and the charging employees then bring review in the Court of Appeals, may the union be denied intervention in the judicial review proceeding wherein it will be determined whether it has violated federal law?

Statement

This case originated from charges brought by certain employees of Wisconsin Motor Corporation before the

[1] Though we believe that statutory certiorari jurisdiction presently lies consistent with the "party to the case" proviso of 28 USC 1254(1), should the Court disagree, we respectfully request leave to have this petition filed as one under 28 USC 1651 for common-law certiorari.

National Labor Relations Board against petitioner, UAW-AFL-CIO, alleging that their rights under Section 8(b)(1)(A) of the Act were being violated by the union. The violation charged was that the union, through disciplinary fines, enforced a regulation establishing a ceiling on piece-rate earnings for all union members. In due course a complaint was issued by the General Counsel, hearings were held with the union the defending party, an intermediate report of a Trial Examiner exonerated the union, and on January 17, 1964 the National Labor Relations Board held that the union piece-rate ceiling did not violate Section 8(b)(1)(A), and dismissed the complaint against the union.

Subsequently, the employees who were the charging parties before the Board filed a petition for review in the Court of Appeals for the Seventh Circuit asking that the Board's decision be vacated and the Board ordered "to enter an order finding that the Union has committed unfair labor practices and granting appropriate relief . . ." Only the Board was named a party defendant to the proceedings. On September 15, 1964, without opposition by the Board, the union filed in the court below a petition (see *infra*, p. 15) to intervene in the pending proceedings. The petition pointed out that the union "will be directly affected by any decision rendered by this court."

On September 16, 1964, the Honorable Latham Castle, Circuit Judge, entered an order denying intervention but granting leave to the petitioner (UAW-AFL-CIO) "to file a brief in this case as amicus curiae without leave to participate in the oral argument of this cause." See *infra*, p. 17. From this denial of leave to intervene as a party, the union filed a petition for reconsideration by the court *en banc* or by a division thereof. See *infra*, p. 18. By an order, without opinion, of October 6, 1964, this petition

was denied per Judges Hastings, Knoch, and Castle. See *infra*, p. 23.

It appears from the action of the court below in this case and in previous rulings (see *infra*, n. 6, p. 8), that as a matter of policy the Seventh Circuit denies intervention in Labor Board review proceedings to the prevailing party before the Board. Certiorari is sought to review a recurrent and important intervention question involving the conflicting administration of justice in federal courts, which should be resolved by this Court's exercise of its general supervisory authority.

REASON FOR GRANTING THE WRIT

This Case Presents a Recurrent and Important Intervention Issue Involving Conflicting Administration of Justice in the Several Courts of Appeals, Which This Court Should Resolve Under Its General Supervisory Authority.

May a union charged before the Labor Board be barred from the judicial review proceedings in which it is to be determined whether the union has violated federal law?

Congress has enacted no statutory intervention provision for Court of Appeals review of Labor Board orders. When a petition to review a Board dismissal of a complaint is brought by the unsuccessful charging party, most circuit courts allow intervention to the prevailing respondent before the Board; but in the First and Seventh Circuits and occasionally in other circuits, such intervention has been denied. See *infra*, p. 8. The effect of such rulings as in the instant case is denial of participation in the Court of Appeals and opportunity to petition for certiorari in this Court to the party charged with violating federal law and against whom government sanctions will run if the agency ruling is judicially reversed. As we show herein, this Court's

review is warranted because the decision below (1) infringes upon the constitutional guarantee of due process of law, (2) presents a clear conflict among the circuit courts, (3) makes sheer fortuity controlling upon the right of intervention, and (4) is subject to this Court's remedial review and correction under its general supervisory authority over administration of justice in federal courts.

1. *Due process infringed.* Barring a party charged before a federal agency from participation in the judicial review of his case, is at odds with numerous due process rulings of this Court. This Court has repeatedly held that a person charged by government with misconduct or law violation, or to be subjected to governmental regulation or legal sanctions, has the right to due process hearing in the adjudication of his case.[2] Where due process applies, it does so from the beginning to the end of the adjudicatory proceedings.[3] It includes equal opportunity to invoke and to participate in appellate judicial review.[4]

Thus the constitutional injury in denial of participation in the Court of Appeals is clear at the stage when the case is heard before that Court. It is equally clear thereafter,

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[2] See *Hovey* v. *Elliott*, 167 U.S. 409; *Londoner* v. *Denver*, 210 U.S. 373; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Morgan* v. *United States*, 304 U.S. 1; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 232-233; *In re Oliver*, 333 U.S. 257; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, (and cases cited at pp. 165-166); *Greene* v. *McElroy*, 360 U.S. 474.

[3] See *Hopt* v. *Utah*, 110 U.S. 574; *Frank* v. *Mangum*, 237 U.S. 309, 327; *Saunders* v. *Shaw*, 244 U.S. 317; *Morgan* v. *United States*, 298 U.S. 468; Cf. *Western Pacific* v. *Southern Pacific Co.*, 284 U.S. 47; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Ashbacker* v. *FCC*, 326 U.S. 327.

[4] See *Saunders* v. *Shaw*, 244 U.S. 317; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657, 665; *Cole* v. *Arkansas*, 333 U.S. 196, 201-202; *Price* v. *Johnston*, 334 U.S. 266, 280; *Griffin* v. *Illinois*, 351 U.S. 12; *Chessman* v. *Teets*, 354 U.S. 156; *Coppedge* v. *United States*, 369 U.S. 438, 447-448.

when in the event of the Court's reversal of the agency decision, the respondent stands convicted of wrongdoing but cannot seek certiorari under 28 U.S.C. 1254 from the adverse judicial decision, having been denied requisite status of a "party to" the case. *In re Leaf Tobacco Board*, 222 U.S. 578. As a party, if the Board should decline to seek certiorari, the intervened respondent may himself seek certiorari.[5] *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335. As an amicus, the Board's decision not to seek certiorari forecloses the respondent. Finally, if this Court grants review, the respondent denied intervention below continues in a non-party status. Such a result is inconsistent with this Court's announced policy (in original cases) that orderly determination of issues "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana*, 354 U.S. 515.

Nor is it an answer to the due process violation that in the event the Court of Appeals or this Court should reverse the decision of the Labor Board, then a new Board order will issue against the respondent in lieu of the former order in his favor and this new order might be brought for

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[5] The practical significance of a Board respondent's opportunity to petition for certiorari is highlighted by a case before this Court at its last term. In *United Steelworkers* v. *NLRB*, 376 U.S. 492, the Labor Board's exoneration of the union from a Section 8(b)(4) charge, was reversed by the Second Circuit. The union, which had been allowed intervention in the Court of Appeals, sought and obtained certiorari under circumstances where the Board had not itself filed a petition for certiorari "because the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government can properly ask this Court to review" (p. 2, *Memorandum for the NLRB*, April 1963). On the merits, this Court unanimously reversed the lower court. Had the case been brought in the Seventh or First Circuits, under identical circumstances there would have been no opportunity for this Court's remedial review.

review to the Court of Appeals by the respondent before the Board as an "aggrieved party." Such a right of subsequent review *may* exist as a technical matter, but it is without substance once the federal appellate courts have adjudicated the merits of the issue. Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 420-423. The suggestion that such an "ex-post facto" judicial hearing suffices to protect the rights of a party is repelled by this Court's ruling in *Ashbacker* v. *FCC*, 326 U.S. 327, 330-331. There the Court rejected the argument that the right of applicant A to a hearing was not infringed by denial of participation in a prior proceeding involving applicant B, when the grant of a license to applicant B would preclude the subsequent grant of a license to applicant A: "We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing." This Court noted that once a competing and mutually exclusive license is granted to an opponent, a party carries a burden "which cannot be met" because it makes "its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent."

No more than in *Ashbacker* does the contingent right to a second proceeding before the appellate courts upon the identical questions of fact and law involved in pending judicial review proceedings afford any real protection to the party barred from participating therein. Even if the "rule of the case" is not formally applied on a second

appellate review of the identical issues, the decision can be no more than a rehearing and reaffirmation of a *fait accompli.*

2. *Conflict of Circuits.* There exists a clear conflict of law among the circuit courts on the question at issue. The Labor Board in this and other cases has concurred in applications to intervene before the circuit courts by respondents who have prevailed before the Board. Nevertheless the Seventh Circuit and the First Circuit have established a policy of denial of intervention to the prevailing respondent before the Board.[6] The great majority of circuit courts on the other hand will permit intervention to the prevailing respondent,[7] and included among these is the Court of Appeals for the District of Columbia Circuit. The conflict between the policy of that Court and the rule in the Seventh Circuit is particularly significant since the statute (Section 10(f)) permits a petition for review of a Labor Board decision to be filed *either* in the District of Columbia Circuit or in the circuit where the alleged unfair labor practice occurred or the petitioner resides or transacts business. Thus if the petitioning union,

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[6] *Flack* v. *NLRB*, 55 LRRM 2299 (C.A. 7), mandamus denied 376 U.S. 948; *Chauffeurs, Teamsters & Helpers "General" Local No. 200* v. *U.S. Court*, (C.A. 7) mandamus denied, 363 U.S. 835; *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (C.A. 1), cert. denied 361 U.S. 863. See also *Haleston Drug Stores* v. *NLRB*, 190 F. 2d 1022 (C.A. 9); *Seafarers' International Union* v. *NLRB*, (C.A. 5) cert. denied 364 U.S. 816. The Seventh Circuit formerly granted such interventions. *Kovach* v. *NLRB*, 229 F. 2d 138 (1956); *Albrecht* v. *NLRB*, 181 F. 2d 652 (1950).

[7] See, e.g., *Amalgamated Clothing Workers* v. *NLRB*, 324 F. 2d 228 (C.A. 2); *Industrial Union of Marine and Shipbuilding Workers* v. *NLRB*, 320 F. 2d 615 (C.A. 3); *Selby-Battersby & Co.* v. *NLRB*, 259 F. 2d 151 (C.A. 4); *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682 (C.A. 4); *International Union, UAW-CIO* v. *NLRB and Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6); *Minnesota Milk Co.* v. *NLRB*, 314 F. 2d 761 (C.A. 8); *Great Western Broadcasting Corp.* v. *NLRB*, 310 F. 2d 591 (C.A. 9); *Local 1441, Retail Clerks* v. *NLRB*, 326 F. 2d 663 (C.A.D.C.); *Teamsters Local 79* v. *NLRB*, 325 F. 2d 1011 (C.A.D.C.).

employer, or individual employee, by reason of residence or place of business, chooses to file for review in the Seventh Circuit, his "opponent" will be barred from participation in the judicial review proceedings, but if he should opt to petition in the District of Columbia a contrary result will obtain. Such a conflict of rules in different circuits on a matter involving rights of substance and importance, requires this Court's review and harmonization.

3. *Intervention Controlled by Fortuity.* In enacting the statutory review procedure from the Labor Board, Congress envisioned orderly continuation of the Board proceedings—proceedings wherein charging parties and respondents have full status as litigants. Yet if the Seventh Circuit's policy stands unreviewed, then sheer fortuity controls the opportunity of parties before the Board to participate in the judicial review proceedings:

i. Statutory review over numerous federal agency decisions, including some Labor Board decisions, lies in the District Court.[8] Rule 24, Federal Rules of Civil Procedure, provides for intervention of right when a statute confers it, or when representation by existing parties may be inadequate and the applicant may be bound by the judgment.[9] It grants permissive intervention when the applicant's claim or defense has a question of law or fact in common with the pending action. Under the standards of Rule 24 applicable to review proceedings in the District

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[8] In addition to the numerous specific statutes providing for such review, District Court jurisdiction is also generally available under Section 10 of the Administrative Procedure Act, 5 USC 1009. Cf. *Leedom* v. *Kyne*, 358 U.S. 184; *ICC* v. *United States Ex Rel. Humboldt SS Co.*, 224 U.S. 474.

[9] "Upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Rule 24(a)(2).

Court, there can be no question but that intervention must be granted to a prevailing party before a federal agency if the agency ruling is judicially challenged. See *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765. But most agency review is in the Courts of Appeals, whose rules contemplate leave to intervene,[10] yet fail to prescribe any standards for such intervention. There is no difference in fact or logic between the intervention issues presented by review proceedings in the Courts of Appeals and those commenced in the District Courts.

ii. Nor is there a discernible difference warranting denial of intervention in the Court of Appeals to a prevailing party before an agency like the Labor Board, when under 5 USC § 1038 the prevailing party before the FCC, the AEC, the Maritime Commission, and the Department of Agriculture, enjoys a statutory right to intervene.[11] Section 1038 provides in the case of Court of Appeals review proceedings from those agencies, that intervention shall be granted to any party "whose interests will be affected if an order of the agency *is or is not* enjoined, set aside or suspended" (emphasis supplied). Moreover, the review statute applicable to the ICC (28 U.S.C. 2323)

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[10] See 1st Cir. Rule 16(6); 2nd Cir. Rule 13(f); 3rd Cir. Rule 18(6); 4th Cir. Rule 27(6); 6th Cir. Rule 13(16); 7th Cir. Rule 14(f); 8th Cir. Rule 27(f); 9th Cir. Rule 34(6); 10th Cir. Rule 34(6); D. C. Cir. Rule 38(f). There clearly exists judicial authority to prescribe intervention rules in the Courts of Appeals similar to Rule 24, Federal Rules of Civil Procedure. See *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 524-25, cert. denied 335 U.S. 912.

[11] It is notable that in explaining the statutory revision of which this section was a part, Congress purported to follow "the pattern established for review of orders of the Federal Trade Commission . . . and followed by other laws since then in relation to many other agencies, including . . . the National Labor Relations Board." H.R. 2122, 81st Cong., 2nd Sess., p. 4.

also requires intervention on behalf of a prevailing party before that agency. See *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, affirmed 338 U.S. 802.

iii. Indeed, in Section 10((l) of the Labor Management Relations Act, Congress recognized the essentially tripartite nature of Labor Board proceedings, providing that when the Board seeks an injunction in the District Court against a Board respondent, its petition shall be served "upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony." 29 U.S.C. § 160 (l) (emphasis added). Yet, whereas Congress has thus granted the right of judicial intervention to the *charging party* in judicial proceedings against a Board respondent, the court below bars the Board *respondent* from participation in a judicial review proceeding brought by the charging party.

iv. Finally, the ultimate anomaly of intervention denial to a prevailing respondent before the Labor Board, is that he is thus disadvantaged by his own success before the agency. Where the respondent *loses* before the Board, under Section 10(f) of the Act he may as an "aggrieved party" become a party in the Court of Appeals and thereafter seek or oppose this Court's review. But as a *prevailing party* before the Board, if denied intervention in the Court of Appeals he may not participate as a party there or before this Court and he may neither seek nor oppose this Court's grant of review.

The right of an accused before a federal agency to participate in judicial review of the agency proceedings against him, is too fundamental for fortuity to govern its observance. Yet if the ruling and policy of the Seventh Circuit remain unreviewed, respondents before the Labor Board (and parties before other agencies) can be denied partici-

pation in the judicial review proceedings although they would enjoy precisely that participation (1) had they lost rather than prevailed before the agency, (2) had the review petition been filed instead in the D.C. Circuit, (3) had the proceedings arisen from federal agency orders reviewable under 5 U.S.C. § 1038, 28 U.S.C. 2323, and 29 USC § 160 (l), or (4) had the proceedings been commenced in the District Court from an agency decision there reviewable, and thus been subject to Rule 24.

It is an established principle of this Court to avoid idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *RFC*, 306 U.S. 381. Yet if the court below is correct, then the accused party before the Labor Board may be denied judicial review participation by virtue of his having prevailed before the agency—and this in the face of a contrary rule in most of the circuit courts and numerous decisions of this Court elaborating due process rights of participation and hearing, contrary to salutary principles of intervention promulgated by this Court and approved by the Congress in Rule 24 of the Federal Rules, and notwithstanding specific recognition of standing to intervene in such statutes as 5 U.S.C. § 1038, 28 U.S.C. § 2323, and 29 U.S.C. § 160(l)).

To accept such a result is to infer Congressional idiosyncrasy. In an analogous administrative agency review context this Court refused to infer quixotic Congressional limitation upon traditional Court of Appeals powers. In *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11, in the absence of a provision for Court of Appeals stay orders on statutory appeals from the FCC, this Court nevertheless upheld "the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal . . .", and rejected the argument that by

its silence Congress had curtailed traditional appellate court powers:

> "These controlling considerations [time-honored ancillary judicial powers to prevent irreparable injury] compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. . . . The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

4. *An Appropriate Supervisory Issue.* It is too late in the day for federal courts to insist on determining *in absentia* whether a respondent before the Labor Board has violated federal law. This Court should grant review herein to resolve, by exercise of its general supervisory authority, a recurrent anomoly in the federal appellate system.

Standards of procedural fairness in the Courts of Appeals are within this Court's *"general power to supervise the administration of justice in the federal courts." Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260. This Court has made the Federal Rules of Civil Procedure applicable to original proceedings first commenced before it (Rule 9.2), and has granted intervention thereunder to interested parties when *"just, orderly, and effective determination of . . . issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." United States* v. *Louisiana*, 354

U.S. 515. Similar principles should apply to agency review proceedings commenced in Courts of Appeals. We urge the Court to grant certiorari herein and hold applicable in the Courts of Appeals such established intervention principles as those recognized in 5 USC § 1038 and Rule 24 of the Federal Rules of Civil Procedure.[12]

Conclusion

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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[12] We are aware that this Court has declined to review the question here presented on a number of occasions. See *supra*, p. 8. However, this Court's review has previously been opposed on the ground that intervention was denied below for particular reasons such as undue delay in applying therefor in the Court of Appeals, or that intervention denial was too occasional to warrant this Court's consideration. The disposition below in the instant case, on the other hand, makes clear that there now exists a policy of intervention denial in the Seventh Circuit, and we have endeavored in this petition to present the variety of compelling reasons for this Court's remedial review of an increasingly recurrent problem.

APPENDIX A: PLEADINGS AND RULINGS BELOW

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14698

SCOFIELD, ET AL., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES

Now comes the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, and moves to intervene in this proceeding and in support of said motion states as follows:

1. The Petitioner is the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, a labor union.

2. The Union was a respondent in the proceeding below before the National Labor Relations Board, in which the charges against the Union were ultimately dismissed by the Board. This dismissal is one of the alleged errors sought to be reversed by the Petitioner SCOFIELD, an individual, whose status was that of a charging party below and is as the Petitioner in this Court. As Respondent below, the Union will be directly affected by any decision rendered by this Court and desires to be heard on the merits of the controversy.

3. The Union participated fully in the proceedings before the Board and believes that its own interest and the interests of justice require that it be permitted to participate in this proceeding.

4. Counsel for the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, has spoken with counsel for Petitioner SCOFIELD and Respondent, National Labor Relations

Board and can advise that both have consented orally to the allowance of our motion to intervene.

5. No delay will be occasioned since your Petitioner herein will file its brief within the time allotted to the Board under the Court's rules.

WHEREFORE, your Petitioner prays that leave be given to the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, to intervene in these proceedings or, in the alternative, to permit the filing of a brief by this Petitioner, without prejudice to participation in the oral argument if permission is granted by the panel of Judges which hears the appeal, in accordance with an order entered by this Court in Ramsey v. NLRB, No. 14226, in a parallel situation.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO.

By JOSEPH L. RAUH, JR.,
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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, September 16, 1964

Before: Hon. LATHAM CASTLE, Circuit Judge.

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On consideration of the motion of counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, for leave to intervene in this proceeding or alternatively for other relief, all parties having consented to the said petition,

IT IS HEREBY ORDERED that leave be granted to said petitioner to file a brief in this cause as amicus curiae without leave to participate in the oral argument of this cause.

Filed October 1, 1964. Kenneth S. Carrick, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR RECONSIDERATION BY THE COURT EN BANC OR BY A DIVISION THEREOF OF ORDER DENYING PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283, hereinafter called United Automobile Workers) petitions this Court for reconsideration by the Court, either *en banc* or by a division thereof as provided for in 28 U.S.C. § 46, of its *Petition To Intervene With Consent Of All Parties.* The said Petition was denied by the Honorable Latham Castle, Circuit Judge, sitting as motions judge pursuant to Rule 4 of the Rules of this Court. In support of this petition, the United Automobile Workers shows to the Court as follows:

1. The *Petition To Intervene With Consent Of All Parties* was filed on September 16, 1964. A true and correct copy thereof is attached hereto.

2. On September 16, 1964, the Honorable Latham Castle, Circuit Judge, entered an order denying the *Petition To Intervene With Consent Of All Parties* and granting leave to the United Automobile Workers to file a brief as amicus curiae and denying leave to participate in oral argument.

3. This proceeding is before the Court upon the petition of RUSSELL SCOFIELD, et al., to set aside the decision of the National Labor Relations Board which dismissed a complaint charging the United Automobile Workers with violation of § 8(b)(1)(A) of the Labor-Management Re-

lations Act of 1947, as amended, because it had fined certain members for exceeding incentive pay ceilings. In dismissing the complaint, the Board held essentially that the conduct of the United Automobile Workers was not within the scope of § 8(b)(1)(A), and in addition, that Congress in enacting the proviso to § 8(b)(1)(A) had refrained from regulating internal union affairs, as it had expressly preserved the right of a labor organization "to prescribe its own rules with respect to the acquisition or retention of membership therein . . ."

4. The decision of the Board dismissing the complaint against the Union was issued on January 17, 1964, and on May 18, 1964, the Board denied a motion for reconsideration thereof. The petition for review was filed in this Court on June 26, 1964. The Board's answer thereto was filed on August 6, 1964.

5. Thereafter on September 2, 1964, the Board released its decision in another case in which it appears to have modified or limited its view of the law as expressed in the case below. In *Local 138, International Union of Operating Engineers,* 148 NLRB No. 74, the Board held that a labor organization had violated § 8(b)(1)(A) of the Act by fining members who had instituted administrative proceedings with the Board without having first exhausted internal union remedies for their complaints. While the Board's decision in the *Local 138* case expressly reaffirms and distinguishes the decision in the case at bar, *Local 138* nevertheless appears to be a modification by the Board, with respect to the interpretation and application of § 8(b)(1)(A) of the Act and the proviso thereto, in cases involving internal union disciplinary action.

6. The petitioner, United Automobile Workers, has great respect for the National Labor Relations Board. The Board, however, in view of this recent decision may no longer be in a position to advocate with undivided heart its decision in favor of the United Automobile Workers in the case below. The United Automobile Workers, respondent in that case, cannot and should not be compelled to rely solely upon representation by the Board for protection of the Union's substantial interests herein. The

circumstances are such that the United Automobile Workers should be allowed to defend its own position fully as an intervening party. Cf. *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768 (C.A.D.C.) An adverse decision in this Court would seriously affect the United Automobile Workers and its members, and might result in the United Automobile Workers and its members being deprived of substantial rights. The Board does not seek to protect private rights of the United Automobile Workers but only to vindicate public matters. In addition, the United Automobile Workers' internal rules and its general internal procedures will necessarily be involved in this Court's consideration and ultimate decision. The United Automobile Workers is entitled to be heard as of right upon substantial questions in this case which turn upon the interpretation of the internal rules by which it is governed. Many other local unions which are affiliated with the same international union may similarly be seriously affected in their internal government by an adverse decision in this case. Important private interests of the United Automobile Workers and its members are here involved. This is a case where "the enforcement of a public law also demands distinct safeguarding of private interests," which are "not left to the public authorities" solely. Cf., *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 505, quoted in *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768. (C.A.D.C.).

7. The United Automobile Workers should be permitted to intervene as a party herein in order to assure its status to seek review in the Supreme Court of the United States in the event of an adverse decision in this Court.[1] Otherwise, if the Board is not disposed to seek review in the Supreme Court in the event of an adverse decision in this Court the United Automobile Workers will be deprived of an opportunity to obtain review of a decision which could involve serious consequences to the United Automo-

[1] An intervenor has standing to seek Supreme Court review of a decree adverse to its beneficial interest in a Board order. *International Union of Mine, Mill and Smelter Workers* v. *Eagle Picher Mining and Smelting Co.*, 325 U.S. 335, 338, 339 (1945).

bile Workers, including the local union herein and many other local unions as well.

8. The petitioner believes that the issue of the right of a party respondent in a Board proceeding to intervene as a party in review proceedings is of sufficient importance to warrant further review of that question by the Supreme Court of the United States. Before requesting such review, petitioner believes it only appropriate to first move this Court for full consideration *en banc* or by a division thereof of its petition to intervene.

9. We are aware that this Court has in other cases denied leave to intervene. However, in at least one recent case, *Ekco Products Company* v. *N.L.R.B.*, No. 12166, February 21, 1958, this Court upon reconsideration granted leave to intervene to a labor organization which had been the successful charging party in a case before the Board. In *Ekco* there had occurred a doctrinal shift by the Board following its initial decision under review; and there as here the union seeking intervention sought to protect its constitution and its other interests which were affected. The Court stated as follows:

> "The United Steelworkers of America, AFL-CIO, having petitioned for leave to intervene, and having represented that the National Labor Relations Board has, since its decision herein, shifted its position upon an issue which is of great importance to said Steelworkers in the case at bar, and generally, whenever that organization has representation contracts; and having further represented that an interpretation of the Constitution of the Steelworkers organization is likewise in issue in the case at bar
>
> "It Is Ordered that leave be granted to the United Steelworkers of America, AFL-CIO to intervene herein and to file its brief on or before ten (10) days from the date of this order, sending copies to the other parties herein."

The reasoning of this Court in *Ekco* in granting intervention to the charging party applies with at least equal if not greater force to this petitioner, which should not be

left as a respondent with no opportunity to defend. A true and correct copy of this Court's order in *Ekco* is attached hereto.

Wherefore, it is urged that this Court reconsider the *Petition To Intervene With Consent Of All Parties, en banc,* or by a division thereof, and grant said Petition.[2] If the *Petition* is granted, the petitioner will promptly file its brief as intervenor so that there will be no delay of the proceedings in this Court.

Respectfully submitted,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (Local 283)

By JOSEPH L. RAUH, JR.,
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[2] Counsel for the Board has authorized us to state that as a matter of policy, the Board does not oppose intervention by the party which was a respondent before the Board, in any review proceedings in courts of appeals.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

October 6, 1964

BEFORE: Hon. JOHN S. HASTINGS, Chief Judge, WIN G. KNOCH, Circuit Judge, LATHAM CASTLE, Circuit Judge

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On consideration of the petition of the respondent in the above entitled proceeding, The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283), for reconsideration by the Court, either *en banc* or by a division thereof, of the order of this Court entered September 16, 1964, denying said respondents's petition to intervene in said proceeding;

IT IS HEREBY ORDERED that the petition for reconsideration be and is hereby DENIED.

(3050-2)

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 650

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, PETITIONER

v.

RUSSELL SCOFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner Union seeks review of an order of the court of appeals denying it leave to intervene in a proceeding brought under Section 10(f) of the National Labor Relations Act (29 U.S.C. 160(f)). The underlying facts are as follows:

Upon charges filed by the respondent employees, the General Counsel of the Board issued a complaint against petitioner Union, alleging that it had violated

Section 8(b)(1)(A) of the Act (29 U.S.C. 158(b)(1)(A)) by fining the employees for failing to adhere to a union rule limiting piece-rate earnings by union members. The Board, after hearing, found that the Union's action did not violate the Act and dismissed the complaint. 145 NLRB No. 9. The employees, pursuant to Section 10(f) of the Act, petitioned the court of appeals to review the Board's dismissal of the complaint. The Union filed a timely motion to intervene in the proceeding, which was not opposed by either the Board or the petitioning employees (Pet. 15, 18-22). The motion was nevertheless denied, first by a single judge, and then, on rehearing, by a panel of the court below. The court, however, granted the Union leave to file a brief as *amicus curiae*. (Pet. 17, 23.)

The question presented is whether, when the Board dismisses an unfair labor practice complaint and the charging party seeks review of the dismissal in the court of appeals, the party against whom the complaint was issued is entitled, upon timely motion, to be permitted to intervene in the proceeding. The Board believes that this question should be answered in the affirmative. For, if the court reverses the Board's dismissal order, the party against whom the complaint was issued stands to incur a liability. Although this would not occur until after a separate judicial proceeding was instituted against that party,[1]

[1] That is, if the Board's dismissal of the complaint were reversed, the Board would have to issue an unfair labor practice order against the respondent and then file a petition to enforce the order under Section 10(e) of the Act.

as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding. The Board believes that these considerations entitle the respondent before it to intervene in a review proceeding brought by the charging party, and therefore has not opposed timely motions to intervene in such circumstances.[2]

Although the question of such intervention is important in the administration of the Act, it has not heretofore presented any serious problem, because the courts of appeals generally have granted timely petitions to intervene (see cases cited Pet. 8, n. 7). The Seventh Circuit, however, has followed a varied pattern, allowing intervention in some cases [3] and denying

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[2] The Board, however, believes that a different conclusion is called for where the Board has found an unfair labor practice, the respondent petitions to review the order issued against it, and the charging party seeks to intervene in the court proceeding. In the latter situation, the Board has generally opposed intervention. For the charging party does not stand to incur any liability, and its only purpose is to help the Board perform a function, i.e., uphold its order, which the Act confers exclusively upon the Board. In this situation intervention has usually been denied, but the charging party has been permitted to participate as *amicus curiae*. See *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485 (C.A. 7).

[3] See *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138; *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652; *American Newspaper Publishers Assoc.* v. *National Labor Relations Board*, 190 F. 2d 45, 48-49; *Eko Products Co.* v. *National Labor Relations Board*, No. 12166, unreported order entered February 21, 1958; *Ramsey* v. *National Labor Relations Board*, No. 14336, unreported order entered November 1, 1963.

it in others.[4] Under the circumstances, it seems desirable for this Court to settle the question.

Accordingly, the Board does not oppose the present petition. If it is granted, the Board's brief will discuss the various relevant considerations on both sides of the question.[5]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE S. GOLD,
Attorney,

National Labor Relations Board.

NOVEMBER 1964

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[4] In addition to the instant case, see *Chauffeurs, General Local No. 200* v. *The United States Court of Appeals for the Seventh Circuit,* petition for writ of mandamus denied, 363 U.S. 835; *Cushman Motor Co.* v. *Honorable F. Ryan Duffy,* motion for leave to file petition for writ of mandamus denied, 376 U.S. 948. See, also, *Amalgamated Meat Cutters* v. *National Labor Relations Board,* 267 F. 2d 169 (C.A. 1), certiorari denied, 361 U.S. 863.

[5] The reasons which prompted the Board to oppose the petition in *Cushman Motor Co.,* n. 4, *supra,* do not apply here. In *Cushman,* the motion to intervene was not timely, being filed after judgment had been entered.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 650

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (LOCAL 283), *Petitioner,*

v.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITIONER'S REPLY MEMORANDUM

This memorandum is submitted to clarify a technical point raised in the Opposition. The individual respondents assert (Opposition, p. 4) that the union which is petitioning this Court differs in some way from its Local 283 which was the named respondent before the Labor Board. Actually, in the court below the petitioning union was interchangeably denominated with and without "Local 283" (see Petition, pp. 15, 22, 23). The original application for intervention in the Seventh Circuit omitted the name of the Local, but it expressly sought intervention for "respondent in the proceeding below". The Petition for Reconsideration below, and the order denying it, include "(Local 283)" in designating the petitioning union.

In this Court, of course, it is the intention—as mani-

fested by the Question Presented and the argument of our Petition—to seek review on behalf of the respondent before the Board (Local 283), from the denial of leave to intervene in the appellate proceedings. But to resolve any conceivable ambiguity concerning the identity of the petitioner based on the caption, after consultation with the Clerk of this Court, the caption was amended to include the designation "(Local 283)". This should make assurance doubly sure that review is sought in this Court by the party which was the respondent before the Labor Board and which was denied intervention in the court below.

For the reasons set forth in our Petition and the support thereof set forth in the Memorandum for the National Labor Relations Board, the writ should be granted.

Respectfully submitted,

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JOHN SILARD,
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7 South Dearborn Street,
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606 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Attorneys for Petitioner.

(3410-8)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 18

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,

Petitioner,

vs.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, and THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,

Petitioner,

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RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, and THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC and GEORGE KOZBIEL hereby oppose the application of Petitioner for a writ of certiorari to review a final order of the United States Court of Appeals for the Seventh Circuit which denied Petitioner leave to intervene in proceedings to review an order of the National Labor Relations Board.

QUESTIONS PRESENTED

1. Is the issuance of a writ of certiorari an appropriate or proper procedure to review an order of a Court of Appeals which denied the Petitioner leave to intervene as a party in a proceeding pending in the Court of Appeals?

2. Should a writ of certiorari be issued to review the order of the Court of Appeals which denied the Petitioner leave to intervene in a proceeding for judicial review of an order of the National Labor Relations Board?

STATEMENT

The statement of the case in the petition herein contains two significant misstatements. It is alleged that the case originated from unfair labor practice charges brought against the Petitioner, UAW-AFL-CIO. This is incorrect. The original charges were brought against Local 283, UAW-AFL-CIO. The complaint of the National Labor Relations Board based upon such charges alleged the commission of unfair labor practices by the local union only. There was no charge or complaint against the Petitioner here. The caption of the amended consolidated complaint which formed the basis for the proceedings before the NLRB is set forth in the Appendix hereto.

The Petitioner refers to its intervention motion in the Court of Appeals as having the consent of all parties. This is not strictly correct. Counsel for the individual employees consented to the participation of the union as *amicus curiae* but opposed the intervention of the union as a party. Counsel for the union communicated this information to the Court of Appeals by letter dated

October 1, 1964, a copy of which is set forth in the Appendix hereto.

REASONS FOR DENYING THE WRIT

1. The Petitioner is Not a Party Entitled to Apply for the Writ.

Under 28 U.S.C. 1254(1) only a "party" to the case may apply for a writ of certiorari. The Petitioner here is clearly not such a party. In fact, the refusal of the Court of Appeals to permit the Petitioner to become a party to the case is precisely the basis for the present petition seeking review.

The argument of the Petitioner is self-contradictory. The principal reason advanced by the Petitioner for its claimed right to intervene in the Court of Appeals is the alleged necessity for the Petitioner to become such a party in order to have the right to petition this Court for a writ of certiorari after the Court of Appeals decides the merits of the proceeding before it. If, as the Petitioner argues, it must become a party to the proceedings in the Court of Appeals in order to have the right to petition this Court for a writ of certiorari, the Petitioner obviously has no right to seek such a writ when its attempted intervention is denied.

In the alternative, the Petitioner seeks "common-law certiorari" under 28 U.S.C. 1651. It is clear that this statutory provision is reserved for the most extraordinary cases. The petition here utterly fails to meet the standards of Rule 30 of the Rules of this Court providing "The issuance by the Court of any writ authorized by 28 U.S.C.A., Section 1651(a) is not a matter of right but of sound discretion sparingly exercised".

2. The Petitioner Has No Interest in the Proceedings Below.

The International Union, which is the Petitioner here, was not the respondent before the NLRB. The complaint of the Board was directed solely against the local union. Thus even if the Court of Appeals were to reverse the order of the NLRB dismissing the complaint against the local union, no order, relief or remedy would be imposed against the Petitioner International Union. It is the height of intermeddling for the International Union, which was not even a respondent before the NLRB, to claim the right to intervene in proceedings to review the order of the NLRB, and further to claim that its demand for intervention rises to the dignity of a constitutional right.

3. There is No Basis for Reversing the Exercise of Discretion by the Court of Appeals.

The National Labor Relations Act provides no authority for the right of intervention claimed by the Petitioner here. Under Section 10(f) of the Act when an aggrieved party petitions for review of an order of the Board, no provision is made for participation by the party which prevailed before the Board. It is the Board itself which assumes the obligation of defending its order. This mode of procedure is perfectly appropriate. As this Court observed in the case of *National Licorice Company v. National Labor Relations Board,* 309 U.S. 350, 362-363:

> "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . . In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights."

The claim of infringement of due process of law is without foundation. The numerous cases cited by the Petitioner in support of this argument are so remote factually as to be of no assistance here.

The NLRB as the respondent in the proceedings in the Court of Appeals will adequately represent the interest which the Petitioner seeks to defend. The participation of the Petitioner in support of the position of the Board would be merely cumulative.

The sequence of events envisioned by the Petitioner is the reversal of the Board order by the Court of Appeals, the entry by the Board of a new order pursuant to the mandate of the Court, and a subsequent petition by the union to review the new Board order. No showing has been made why this procedure will not adequately protect the rights of the union and why the union must be admitted at this earlier stage of the proceeding.

The alleged conflict in the decisions of the various Courts of Appeals stems from the compilation of cases by the Petitioner rather than from any direct comment by the Courts. Not one of the cases cited by the Petitioner as permitting intervention contains any discussion of the intervention question. The most that can be said is that the Petitioner has found a number of cases in which intervening parties apparently participated. This evidence merely demonstrates that in those particular cases the respective Courts exercised their discretion in favor of permitting intervention. Certainly the cases fail to establish any policy one way or the other in any of the Courts of Appeals. The Petitioner concedes that even the Seventh Circuit has sometimes permitted intervention and sometimes denied it.

By way of contrast, there are at least five decisions by Courts of Appeals specifically considering the question of the right to intervention in proceedings for review of NLRB orders. Each of the decisions denies any right to intervene on behalf of the party prevailing before the NLRB. Moreover, these decisions are not limited to the First and Seventh Circuits as argued by the Petitioner. *Aluminum Ore Co. v. N.L.R.B.*, 131 Fed. 2d 485 (C.A. 7); *Stewart Die Casting Corp. v. N.L.R.B.*, 132 Fed. 2d 801 (C.A. 7); *Haleston Drug Stores v. N.L.R.B.*, 190 Fed. 2d 1022 (C.A. 9); *Amalgamated Meat Cutters v. N.L.R.B.*, 267 Fed. 2d 169 (C.A. 1); *N.L.R.B. v. Florida Citrus Canners Cooperative*, 288 Fed. 2d 630 (C.A. 5).

Those Circuit Courts which have expressly commented upon the intervention question deny any right of intervention. In certain cases the various Courts of Appeals in the exercise of their discretion have permitted intervention. The Petitioner has cited no reported decision in which any Court of Appeals has considered the issue and found an absolute right of intervention in proceedings of this nature.

CONCLUSION

The petition concedes that this Court has considered and denied similar petitions in the past. No sufficient reason appears for this Court to depart from its past rulings in this regard. The petition should be denied.

Respectfully submitted,

JOHN G. KAMPS
JAMES URDAN
411 East Mason Street
Milwaukee, Wisconsin 53202
Attorneys for the
Individual Respondents

APPENDIX

Caption of Amended Consolidated Complaint

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT
AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW-AFL-CIO
(WISCONSIN MOTOR CORPORATION)

and

Case No. 13-CB-1059-1
13-CB-1059-2
13-CB-1059-3
13-CB-1059-4

RUSSELL SCOFIELD, an individual
LAWRENCE HANSEN, an individual
EMIL STEFANEC, an individual
GEORGE KOZBIEL, an individual

Letter Stating Position of Parties With Respect to Motion to Intervene

October 1, 1964

Mr. Kenneth J. Carrick
Clerk of the United States Court
of Appeals for the Seventh Circuit
1212 North Lake Shore Drive
Chicago, Illinois 60610

Re. Scofield, et al., v. N.L.R.B. No. 14698

Dear Mr. Carrick:

We wish to advise the Court that after the filing of the Petition To Intervene With Consent Of All Parties, Mr. John G. Kamps, counsel for Russell Scofield et al., petitioners in this case, advised us that at the time he gave his oral consent to the petition he had thought that the proposed intervention would be limited to that of an amicus curiae. Mr. Kamps' position, as stated to us, is that he does oppose our intervention in the proceeding as a party, and we are delivering this letter by hand so that there will be no possible misunderstanding of his position by the Court.

Counsel for the National Labor Relations Board, respondent in this case, has advised us that the Board consents to our petition for intervention as a party.

Very truly yours,

KATZ & FRIEDMAN

Harold A. Katz

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CITATIONS

MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 18

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 283, *Petitioner,*

v.

RUSSELL SCOFIELD, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision and order of the National Labor Relations Board is reported at 145 NLRB 1097. Without opinion, the United States Court of Appeals for the Seventh Circuit denied leave to petitioner to intervene in the review proceedings brought in that court by the respondents Scofield, et al. The order denying leave to intervene appears at R. 8, and the order denying a petition for reconsideration of that action appears at R. 15.

Jurisdiction

The order of the Court of Appeals denying leave to intervene was entered on September 16, 1964, and a timely petition for reconsideration was denied by order dated October 6, 1964.

The petition for a writ of certiorari was filed on November 4, 1964, and was granted on January 8, 1965. 379 U.S. 959.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

When the National Labor Relations Board dismisses an unfair labor practice complaint against a union and the charging employees then bring review proceedings in a Court of Appeals pursuant to § 10(f) of the National Labor Relations Act, is the union entitled to intervene in the review proceedings wherein the union's compliance with or violation of federal law will be determined?

Statute Involved

National Labor Relations Act, as amended, Section 10(f), 29 U.S.C. § 160(f):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside . . . Upon the

filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Statement

This case presents the question whether a union accused under the National Labor Relations Act of violating the rights of dissenting members may be denied the opportunity to defend itself against this charge in the Court of Appeals review proceedings wherein the lawfulness of its conduct is to be adjudicated. The outcome of this dispute between the Union and its members is of particular and personalized concern to the Union, and the situation in which it arose warrants somewhat extended discussion.

This case originated in charges brought by certain employees of the Wisconsin Motor Corporation, located in West Allis, Wisconsin, before the National Labor Relations Board. They asserted that the petitioner Union had violated their rights under § 8(b)(1)(A) of the National Labor Relations Act.[1]

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[1] Section 8(b) provides in pertinent part that: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . ."

More specifically, the employees charged that Union enforcement (by way of disciplinary fines and court suit to collect the fines) of Union by-laws applicable to all Union members[2] denied them their Section 7 rights.[3] As summarized in the Board's decision and order, 145 NLRB at 1098, the Union regulation in question has been in effect for 25 years and, by its own terms, is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide." Ceilings are established in each of the five labor grades to impose a limitation on the amount of "incentive pay" a member may earn over the "machine rate", the minimum contract rate for that job classification. The present ceilings are set at between 45 and 50 cents per hour over the machine rate.

When a member attains the ceiling rate for the day, he may continue to work. But, to comply with the Union rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payments; he may later draw on this "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." The Company itself, however, places no limitation on an employee's earnings and will, if the

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[2] The employees, pursuant to the current bargaining contract, are required either to join the Union and maintain good standing, or to reject membership and pay a service fee to the Union. 145 NLRB at 1097-8.

[3] Section 7 of the Act provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)".

employee so desires, pay him for all production which he reports.

The considerations which led the Union to establish this incentive pay ceiling were summarized as follows by the Board's Trial Examiner (145 NLRB at 1119):

> "... the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded ... These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of 'stakhanovism,' under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances."

Union members who violate these production ceilings are subject under the rule to a fine of $1.00 for each violation. Persistent violators may be subject to a charge of conduct unbecoming a member; in that event a fine of $100 or less may be imposed and a member suspended. Expulsion from the Union may also follow, though the member's status as an employee may not be impaired. Nonmembers of the Union are not subject to this rule. 145 NLRB at 1098.

Although the Union rule is not incorporated as such in the collective bargaining agreement as a term of employ-

ment, the Company has accepted the ceilings as "an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure." 145 NLRB at 1098. Moreover, the Company uses the ceilings in computing wages and evaluating jobs, and proposals to increase the ceilings have played important roles in the negotiation of collective bargaining agreements. And the Company, though not enforcing the ceiling rule, voluntarily aids and cooperates with the Union in administering the rule by making the necessary bookkeeping entries, allowing the current ceilings to be posted on its bulletin boards, and permitting Union officials to examine the members' production records on Company time. 145 NLRB at 1099.

At one such semi-annual inspection of the records in 1961, the Union found that six employees had violated the Union rule by reporting to the Company, for immediate payment, production in excess of the Union ceilings. Following appropriate Union procedures, they were found guilty of conduct unbecoming a member, were fined in amounts ranging from $50 to $100 and were suspended from Union membership for periods up to a year. Their job status, however, was at no time impaired or threatened. 145 NLRB at 1099.

Two members subsequently paid the fines; the other four filed charges with the Board, alleging that the Union's action in imposing the fines for breach of its production rule violated § 8(b)(1)(A) of the Act. The Union brought a state court suit to collect these unpaid fines.

The General Counsel of the Board issued a complaint against the Union; and following appropriate proceedings in which the Union participated as a party, the Trial Examiner issued his intermediate report recommending that the complaint be dismissed. Thereafter the Board

affirmed the Trial Examiner's conclusion that the petitioner Union had not violated § 8(b)(1)(A) and that the respondent employees' complaint should be dismissed. 145 NLRB 1097. In the majority's words, 145 NLRB at 1104, "The Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee."

Member Jenkins, concurring, rested on the proposition that the employees, being free either to join the Union and be subject to the rule or to refrain from joining and not be subject to the rule, were not "coerced" in their rights under § 7.

On the other hand, Member Leedom in dissent took the position that the fines imposed by the Union constituted restraint and coercion within the meaning of § 8(b)(1)(A) and that the proviso to that section did not protect the Union conduct in question. In his judgment, the Union's attempt to control production and wages clearly related to employment and not to Union membership and hence was not an internal Union matter. 145 NLRB at 1111.

Thereafter, on June 26, 1964, the respondent employees filed in the United States Court of Appeals for the Seventh Circuit a petition for review of the Board's order dismissing their complaint. R. 1-4. The petition for review prayed that the decision and order of the Board be vacated and set aside and that the Board be directed to enter an order "finding that the Union has committed unfair labor practices and granting appropriate relief." R. 3.

The Board duly filed an answer to the petition, averring that "the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were in all respects valid and proper." R. 5. And the answer prayed

that the court enter "a decree denying all the request for relief contained in the petition for review." R. 5.

On September 15, 1964, following the filing of the Board's answer, the petitioner Union filed a petition to intervene in the pending appellate review proceedings. R. 6-7. The petition asserted that "the Union will be directly affected by any decision rendered by this Court and desires to be heard on the merits of the controversy," and that the Union's "own interest and the interests of justice require that it be permitted to participate in this proceeding." R. 6. It was noted that no delay would be occasioned since the Union would file its brief within the time allotted to the Board under the court's rules. R. 7. The Board consented to the intervention petition; the employees did not.

On September 16, 1964, Circuit Judge Latham Castle, in accordance with previous rulings of the Seventh Circuit, entered an order denying the petition to intervene but granting leave to the petitioner Union "to file a brief in this cause as amicus curiae without leave to participate in the oral argument of this cause." R. 8. The Union thereupon filed a timely petition for reconsideration by the court *en banc* or by a panel thereof. R. 9-13. On October 6, 1964, however, the petition for reconsideration was denied by a panel composed of Chief Judge Hastings and Circuit Judges Knoch and Castle. R. 15.

This Court then granted the petition for writ of certiorari to review the order denying leave to intervene. 379 U.S. 959. Further proceedings in the Court of Appeals were stayed pending the completion of review by this Court.

Summary of Argument

A

Section 10(f) of the National Labor Relations Act is silent relative to the right of a person, charged before the Board with having committed an unfair labor practice, to intervene in court proceedings brought by the charging party to review the Board's dismissal of the complaint. But this silence of Congress has very little significance. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 11. The failure of Congress in § 10(f) to spell out the intervention rights of a party charged with having committed an unfair labor practice cannot be taken as an indication that no such rights exist. This is especially true here where due process considerations and other indications of Congressional intent strongly militate in favor of petitioner's right of intervention.

B

The demands of due process require intervention. This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101; and see *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 107-108; *Greene* v. *McElroy*, 360 U.S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the review proceedings envisaged by § 10(f).

The presence of the petitioner as a party to the administrative proceedings was essential to the assertion of the

Board's jurisdiction. The whole purport of the Board proceedings was to determine whether a compulsory order should be directed to the petitioner commanding it to desist from enforcing its challenged rule. The essence of the appellate review proceedings was precisely the same as that of the administrative proceedings—to adjudicate petitioner's alleged Labor Act violation. Should the respondent employees prevail in the judicial review proceedings, the Labor Board will be ordered to reinstitute the complaint, to adjudicate petitioner a Labor Act violator, and to order appropriate remedial relief. In these circumstances the due process factors which compelled the joinder of the Union as a party to the Board proceedings would seem equally appropriate to the appellate review proceedings, at least to the extent of recognizing an absolute right on the part of the Union to intervene and defend its own interests under review.

An essential ingredient of procedural due process is the right to be heard at all critical stages where one's interests are directly at stake. The Union has the right to be heard directly; the Board is not the representative of the Union before the courts and Congress has nowhere taken from the petitioner the right to defend itself in the appellate court.

Furthermore, status as an *amicus curiae* is wholly inadequate; only as an intervener can the petitioner help shape the form of the record, determine the issues, participate in oral argument, petition for rehearing, seek certiorari. The *amicus curiae* rights, in short, are the products of the sufferance of the court rather than the products of due process considerations. The equitable and due process demands which of necessity underlie the review procedure of § 10(f) inescapably lead to a recognition of an absolute

right on the part of the petitioner Union to intervene, upon its request, in the proceedings below.

C

Read in conformity with practical considerations, the judicial review procedures should be construed to require intervention, upon request, by a party charged with violation of the Labor Act. To allow intervention to the petitioner at this stage of the proceedings is to avoid multiplicity of litigation. Petitioner—if denied intervention and if adversely affected by an appellate reversal of the Board's order—would be an "aggrieved party" free to seek a subsequent review of an adverse Board order entered on remand from the appellate court. Allowance of intervention at this point would eliminate the need for such a fruitless proceeding.

Closely allied with the practical desirability of avoiding multiplicity of litigation (particularly of the empty variety) is the fact that intervention at this point assures that the possibility of review by this Court of any adverse determination will be fully explored and exhausted at a point where such a review would be most meaningful. Indeed, intervention at this point is the only way to assure that all interested parties would be present in any review proceedings before this Court.

The ultimate anomaly of intervention denial to a prevailing respondent before the Board is the disadvantage he may suffer by his own success before the agency. As a *losing* party, he could have appealed; as the *prevailing* party, he cannot participate as a party on review and may have an order entered against him by the courts without any opportunity to participate at a meaningful stage in the review proceedings.

D

Read in *pari materia* with comparable legislation, the judicial review procedures should be construed to require the right of intervention and participation by the charged party. 5 U.S.C. § 1038, adopted in 1950, altered the pattern of judicial review of certain federal agencies and included a specific provision regarding intervention in the court of appeals by private parties directly affected by agency orders. The legislative history of that statute makes clear that Congress was following what it deemed to be the procedure for review of National Labor Relations Board orders. It would be irrational not to adopt the legislative policy of 5 U.S.C. § 1038 when interpreting and applying such provisions as § 10(f) of the National Labor Relations Act—particularly where such policy not only is the major Congressional expression on this matter but is consistent with the demands of due process and equity.

E

The analogy of the Federal Civil Rules favors intervention here. Although those rules, of course, generally apply only to procedures in the federal district courts, the principles set forth provide useful analogies in the fair execution of the appellate review procedures contemplated by § 10(f) of the Labor Act.

Rule 19(a) deals with the necessity of joining as parties to a controversy "persons having a joint interest" therein. The equitable considerations underlying the need for joining indispensable parties, as recognized by Rule 19(a), are precisely the same considerations applicable here concerning the due process requirements of permitting appellate intervention by a party whose interests are directly at stake. Had it been possible for the respondent em-

ployees to bring an action in a federal district court, Rule 19(a) would clearly have required the joinder of the Union as a party defendant—which it so obviously is. No different result should follow in an appellate proceeding under § 10(f).

Equally analogous are the intervention provisions contained in Rules 24(a)(2) and 24(b)(2). The basic principle of allowing intervention under Rule 24 in order to safeguard private interests in the course of enforcing a public law is fully applicable to intervention in an appellate court. Intervention here would seem to be a matter of right under the compelling analogy of Rule 24.

Argument

The issue in this case arises because Congress, in establishing the judicial review procedure of the National Labor Relations Act, as amended, has made no explicit provision regarding intervention, a silence which may have led the court below to deny intervention.

Specifically, § 10(f) is silent relative to the right of a person, charged before the Board with having committed an unfair labor practice, to intervene in court proceedings brought by the charging party to review the Board's dismissal of the complaint. The section simply provides that the person aggrieved by the Board's failure to grant the relief sought "may obtain a review of such order in any [appropriate] United States court of appeals . . . by filing in such court a written petition praying that the order of the Board be modified or set aside." The appellate court, says § 10(f), thereupon has complete jurisdiction "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

The charging party, of course, can invoke a § 10(f) re-

view proceeding in such a way as to avoid all problems of intervention. He can name as respondents in the petition for review not only the Board but all other parties in the Board proceedings, including the prevailing party.[4]

Where the charging party does not name the charged party as a respondent, there is a conflict among the circuits concerning the right of the prevailing respondent before the Board to intervene in the judicial review proceedings. Pet. for Cert., p. 8. The rules in the Third, the Ninth and the District of Columbia Circuits require a petitioner seeking review of an administrative order to "serve a copy [of the petition] on all parties who have been admitted to participate in the proceedings before the agency . . ."[5] and these circuits are among those permitting charged party intervention in the appellate proceedings. Pet. for Cert., p. 8. But in some of the other circuits, including the court below, when the petition for review designates only the Board as a respondent, omitting all other opposing private parties before the Board, the intervention rights of the prevailing party are less clear. Then, as in this case, a determination must be made as to whether the prevailing party has an enforceable right, upon request, to intervene in the appellate court.[6] We

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[4] See, e.g., *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6), where the charging party (the union) filed a petition to review a portion of the Board's order setting aside its complaint against the employer for refusal to reinstate striking employees. The petition named as respondents both the Board and the employer.

[5] Rule 18(1) of the Third Circuit; Rule 34(1) of the Ninth Circuit; Rule 38(a) of the District of Columbia Circuit.

[6] An analogous problem arises with some frequency in this Court in cases involving review of administrative agency action. On occasion a petitioner in such a case will name only the agency as a respondent before this Court, omitting the other private parties who were involved in the agency proceeding and who were parties to the lower appellate proceeding by intervention or otherwise. Intervention is not normally allowed by this Court in cases within its appellate jurisdiction. But, on motion by an omitted party, the Court usually allows him to become a named respondent

submit in this brief that such a right of intervention arises (1) from the due process requirements of the Fifth Amendment, (2) from the proper implications of Congressional intention, and (3) from practical and fairness considerations appropriate to this Court's exercise of authority over the administration of justice in federal courts.

A. *The Silence of Congress Is Not Controlling*

The appellate sections of the National Labor Relations Act are silent concerning the right to intervene in review proceedings involving Labor Board orders. Nor is there any discussion of intervention in the legislative proceedings leading to the enactment of these provisions in the 1935 Wagner Act or in the 1947 Taft-Hartley amendments.[7]

This silence of Congress has very little significance. In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4, 11, this Court recognized that the silence of Congress as to the conventional power of an

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and thus to participate fully in the proceedings in this Court. See, e.g., *Wisconsin* v. *Federal Power Commission,* 369 U.S. 847; *Labor Board* v. *Lion Oil Co.,* 351 U.S. 979.

It has been said, with respect to this situation, that "Neither the Rules nor any good reason justify such an omission. It is unfair that any such persons who were adverse parties below and who will be prejudiced by reversal of the judgment not be given notice and an opportunity to oppose when the case is taken to the Supreme Court." Stern and Gressman, Supreme Court Practice, Sec. 6-35, p. 239 (3rd ed., 1962).

[7] Senator Wagner explained only that "Under the new bill, the orders of the Board are enforceable only through the Courts, and any aggrieved party has the right of appeal to the Courts. The bill does not take a single new step in outlining the respective scope of courts or administrative bodies". Legislative History of the National Labor Relations Act, 1935 at p. 4. The Senate Report recites that "As is the case of other administrative tribunals, the Board upon the basis of evidence may issue an order, and this order may be brought by the Board or by an aggrieved person before the Circuit Courts of Appeal . . . The court can then affirm, set aside, or modify the order". Id. at p. 1107. There was further reference (in regard to filing a record) that Congress intended "the regular rules of the circuit courts of appeals" to be "applicable". Id. at 1364.

appellate court to stay the enforcement of an administrative order pending the appeal therefrom did not destroy or dilute that power. The controlling assumption, said the Court, is that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." And the Court emphasized (p. 11):

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress has said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

And so in this case, the failure of Congress in § 10(f) to spell out the intervention rights of a party charged with having committed an unfair labor practice cannot be taken as an indication that no such rights exist. In *Tatum* v. *Cardillo,* 11 F.R.D. 585 (S.D.N.Y.), the Court permitted an employer and its insurer to intervene as parties defendant in a suit for review of an order by a deputy commissioner in the Bureau of Employees' Compensation. It made no difference that the statute provided that the action should be brought against the deputy commissioner. "The statute does not provide that the deputy commissioner shall be the only *party* defendant." 11 F.R.D. at 586.

So, too, in *Roberts* v. *National Labor Relations Board,* —— F.2d —— (App. D.C., decided July 21, 1965), Judge Fahy pointed out that the National Labor Relations Act did not contain a provision (similar to the pro-

hibition against employers) making it an unfair labor practice for a union to discriminate against an employee because he has filed charges under the Act. But Judge Fahy added that "We think none was required." Judge Fahy reasoned that in light of the necessity to keep open the channels created by Congress for the administration of a public law and policy, "the legislators may have decided it was unnecessary to make specific prohibitions against union interference with the initiation of charges."

Even closer in point is *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197. There, the issue concerned the right of a union to be made a party in a Labor Board proceeding. The Board urged that "the National Labor Relations Act does not contain any provisions requiring these unions to be made parties; that Section 10(b) authorzes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged." This Court rejected that contention because: "In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed." 305 U.S. at 233.

So here, a construction of the Act denying a person charged with violation of the Labor Act the right to be made a "party" and defend himself, would at once raise questions concerning the "validity of the Act if so construed."

B. *The Demands of Due Process Require Intervention*

This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony

with the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 101; and see *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 107-108; *Greene* v. *McElroy*, 360 U.S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Moreover, as noted in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49, "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate, and where applicable, permeates every valid enactment of that body."

Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the review proceedings envisaged by § 10(f). There is no language in that section that contradicts those requirements. The "manifest purpose in requiring a hearing," once the appellate jurisdiction has been invoked under § 10(f), "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." See *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 182; see also *Carter* v. *Kubler*, 320 U.S. 243, 247, construing a provision of the Bankruptcy Act as necessarily guaranteeing "a fair and full hearing."

An elemental ingredient of procedural due process is the right to be heard at all critical stages where one's interests are directly at stake. Compare *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353; and *Lane* v. *Brown*, 372 U.S. 477. It is that right that is involved in petitioner's effort to intervene in the court proceedings below. And it is that right that petitioner believes is incorporated into the provisions of § 10(f) by virtue of the foregoing principle of statutory construction, a principle grounded upon an irrebuttable presumption that, absent contrary words, Congress intended to make available all

rights essential to a due process hearing in the courts of appeals. The considerations that affirmatively justify and indeed compel such a reading of § 10(f), leading to the conclusion that petitioner has an absolute right to intervene in the court proceedings below, may be stated as follows:

With respect to the administrative proceedings before the Board, both the elementary dictates of due process and the express provisions of § 10(b) of the Act[8] required that the petitioner Union be made a party to those proceedings. See *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 366. Charged with having committed an unfair labor practice, the petitioner was entitled to notice and opportunity to be heard at all stages of the Board proceedings and to participate fully as a party thereto. Only in that way could the petitioner adequately defend, explain and justify its rule regarding incentive pay ceilings; and only in that way could the petitioner hope to convince the Trial Examiner and subsequently the Board that enforcement of its rule did not violate § 8(b)(1)(A). Indeed, as the *National Licorice* opinion indicates, 309 U.S. at 362, in the absence of the petitioner as a party to such a proceeding, the Board would be without power "to make a binding adjudication of the rights in personam of parties [such as this Union] not brought before it by due process of law."

The presence of the petitioner as a party to the administrative proceedings was thus essential to the assertion of the Board's jurisdiction. Without that presence,

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[8] Section 10(b) provides that the unfair labor practice complaint shall be served upon the charged party and that the person "so complained of shall have the right to file an answer to the original or amended complaint." See also Sec. 102.8 of the Board's Rules and Regulations, Series 8, revised Jan. 1, 1965, defining a "party" to Board proceedings to include "any person named as respondent . . . in any proceeding under the act . . ." 29 C.F.R. § 102.8.

the Board could not have made any determination as to the validity of the Union rule or issued, as requested, any order directed against the Union.[9] Here, the whole purport of the Board proceedings was to determine whether a compulsory order should be directed to the petitioner, commanding it to desist from enforcing its challenged rule. And those proceedings being of an adjudicatory nature, involving binding determinations directly affecting the legal and statutory rights of the petitioner Union vis-a-vis the respondent employees, it was imperative that the full scope of fair procedures normally associated with the judicial process be utilized by the Board—including the joinder of the Union as a formal party. Cf. *Hannah* v. *Larche*, 363 U.S. 420, 442.

Nor did the ultimate dismissal of the complaint by the Board in any way diminish the right of the petitioner to continue as a party to the Board proceedings. That right was generated by the original purpose and nature of the proceedings, not by their outcome before the Board. When the respondent employees, "aggrieved" by such dismissal for purposes of § 10(f), decided to seek judicial review of the Board's action, the essentially accusatory nature of the proceedings under review continued unaltered. The basic thrust of the appellate proceedings was to determine the legality of the challenged Union

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[9] In *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 232-233, the Court held that certain independent unions "having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside" by the Board; the Board order in the case directed the company—not the unions—to desist from giving effect to the contracts. But when the union is company-instigated or company-dominated, and when the union contracts are the "fruits of unfair labor practices", this Court has denied such a union an absolute right to participate in Board proceedings directed only against the employer. *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261; *National Licorice Co.* v. *Labor Board*, 309 U.S. 350; *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U.S. 146.

rule and to obtain relief against its continuance by the Union. The essence of the appellate review proceedings was precisely the same as that of the administrative proceedings—to adjudicate petitioner's alleged Labor Act violation. Should the respondent employees prevail in the judicial review proceedings, the Labor Board will be ordered to re-institute the complaint, to adjudicate petitioner a Labor Act violator, and to order appropriate remedial relief.[10]

In these circumstances the due process factors which compelled the joinder of the Union as a party to the Board proceedings, would seem equally appropriate to the appellate review proceedings, at least to the extent of recognizing an absolute right on the part of the Union to intervene and defend its own interests under review. It is one of "the ordinary rules respecting appeals" that "all parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis* v. *Mercantile Trust Co.* 152 U.S. 590, at p. 593.[11]

The Board order under review in this case was one that directly benefited the Union by recognizing its legitimate interest in incentive pay ceilings and by acknowledging the legality of the Union rule under § 8(b)(1)(A). A more intimate or substantial interest in the subject matter of the

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[10] In that event, as will be shown later, petitioner would become a party "aggrieved" with a *pro forma* right to seek judicial review (see p. 28, *infra*).

[11] In the *Davis* case, this Court dismissed appeals taken by an individual bondholder and stockholder, allowed to intervene in the proceedings below, from orders confirming the sale of mortgaged property and decreeing a mortgage foreclosure. The appeals named only the Trustee as appellee and omitted the mortgagor, the mortgagee and other interested parties. Such omission led this Court to dismiss the appeals, stating that "Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties." 152 U.S. at 594.

appeal would be difficult to imagine. Recognition of the right of such an interested party to intervene and to become a formal party at the appellate level would thus appear to be something more than "of a technical nature . . . [it] rests upon the plainest principle of justice . . ." *Consolidated Edison Co.* v. *Labor Board, supra,* 233. The Board having no power to entertain an unfair labor practice charge or to enter an order against a person not a party to the proceeding, an appellate court should have no greater power on review. A court, no less than an administrative agency, cannot "adjudicate directly upon a person's right, without the party being actually or constructively before the court." *Mallow* v. *Hinde,* 12 Wheat. 193, 198.

The fact that the Board is a party to the appellate proceedings below and seeks to sustain the administrative order absolving the petitioner Union does not transform the problem or eliminate the unfairness inherent in the preclusion of the petitioner as a party. The Board, of necessity, participates in the appeal "as a public agency acting in the public interest." *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261, 265.[12] It is not the representative of the Union; nor does it seek to vindicate or defend the parochial interests of the Union which lie at the heart of this appeal. Before the Court of Appeals, and on possible review in this Court, the Board may take action, espouse positions, or invoke procedures, with which the petitioner does not concur. The fact that

[12] And see *Textile Workers Union of America* v. *Allendale Co.,* 226 F. 2d 765, 768 (App. D.C.): "The right of the appellants to intervene is not affected by the fact that the general position they assert is already represented in the action by the Secretary of Labor. The Secretary's response to the motions to intervene declares that neither the appellants nor the appellees can show themselves to be directly affected by the [prevailing minimum wage level] determinations. This is hardly an assurance of adequate representation for the appellants. Even if the Secretary espoused the appellants' interests with greater heart, it would not necessarily preclude their appearance to plead for themselves."

the Union persuaded the Board that it had not violated the statute did not constitute a relinquishment to the Board of the defense of the Union's innocence upon the transfer of the controversy to the Court of Appeals. Congress has nowhere taken from the petitioner the right to defend itself in the appellate court in these circumstances.

Labelling the appellate controversy as one solely between the respondent employees and the Board is thus misleading. The interests of the petitioner Union are the very focus of that controversy; the whole thrust of the petition for review is to obtain an order directed at the Union. The Union for practical purposes is like those parties "whose interest in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity without which the court cannot proceed." *Barney* v. *Baltimore City,* 6 Wall. 280, 284. An appellate resolution of the statutory rights and obligations of an absent party is so "wholly inconsistent with equity and good conscience," *Shields* v. *Barrow,* 17 How. 130, 136, that such a party must be considered to have a due process right to intervene and to be heard when he so desires. And to interpret and apply § 10(f) as necessarily encompassing and incorporating that right makes § 10(f) consistent with "equity and good conscience" as well as with the inexorable commands of procedural due process. Congress has given no indication that § 10(f) is to be administered in any other manner. The petitioner's right to an opportunity to be heard in these circumstances is too fundamental a proposition in our jurisprudence to be read out of § 10(f).

Finally, the privilege of appearing and filing a brief *amicus curiae,* which was accorded the petitioner Union in this case, cannot be considered as an adequate substitute

for the right of intervention as a party in the appellate proceedings. An intervener, once he becomes a party, enjoys the full panoply of rights accorded the Board and the "aggrieved" parties encompassed by the due process concept of a fair hearing. These rights are broad and of great significance.

Typically, an intervener, but not an amicus, is permitted "to participate in the designation of the record".[13] The record consists of the pleadings, evidence, and proceedings before the agency[14] but the appendix includes only "those matters of record which are relied on by the parties in their briefs and which the parties desire the court to read".[15] The charged party vindicated by the Labor Board can, if permitted to intervene, put before the reviewing court that evidence which he desires the court to read. As an amicus, he is powerless if testimony and facts he deems crucial are omitted by opposing counsel from the appendix.

Typically, an intervener, but not an amicus, participates in the prehearing conferences where the parties "consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court". Agreement at these conferences "limits the issues".[16] The charged party vindicated by the Labor Board, if not permitted to intervene, may find that all the issues he considers vital have been "limited" out by agreement of opposing counsel. He cannot brief these excluded issues, even when the evidence concerning these issues have not been eliminated from the record by opposing counsel in designation of the record.

Typically, an intervener, but not an amicus, is entitled

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[13] Rule 14(f), United States Court of Appeals for Seventh Circuit.
[14] Rule 14(g), United States Court of Appeals for Seventh Circuit.
[15] Rule 16(d), United States Court of Appeals for Seventh Circuit.
[16] Rule 14(k), United States Court of Appeals for Seventh Circuit.

to participate in oral argument.[17] The function of oral argument is to provide counsel with the opportunity to answer questions which remain after the briefs have been studied. In all deference, it is suggested that the amicus brief of petitioner, but not the brief of the Labor Board, would raise questions in the mind of the reviewing court below. The brief of the Labor Board before the Seventh Circuit on the ultimate merits is exhaustive and thorough in its treatment of Section 8(b)(1)(A). The statute, its legislative history, the Labor Board and Court interpretations, and the commentaries by legal scholars are all discussed in depth. Nothing remains to be said on these points. But not once in the argument did the Labor Board brief refer to the record in this case, not once in the argument did the Labor Board brief refer to the facts of this case. Petitioner's amicus brief, on the other hand, discusses not a bare-bones legal proposition, but the facts and issues of this case: the 1937 UAW reaction to "Stakhanovism" or the "speed-up"; the 1943 UAW reaction to the War Production Board plan for "incentive pay"; the origin and reasons for the 1944 plan by the workers at Wisconsin Motors to place a limit upon piece-work earnings; and the proper balance to be sought between (i) the right of the union to protect its members and (ii) the right of the union members under Section 7 to violate union by-laws democratically reached by majority vote. Analogies are drawn from practical union practices, hypotheticals based on plant practices are raised to prove legal conclusions. In sum, the Labor Board brief filed below on the merits invites little if any oral controversy. The petitioner's amicus brief below invites a dialogue on the practicalities of industrial relations within the statutory framework. Denial here of the right to oral argument is, in a real and mean-

[17] See, e.g. Rule 18(i) of the United States Court of Appeals for the District of Columbia Circuit.

ingful sense, a denial both of full participation in the review proceedings and of the right to self protection.

An intervener, but not an amicus, is permitted to petition for rehearing.[18] This right is not often used, but when its exercise is necessitated, it is a vital right indeed.

Finally, the intervener has the very important right to appeal and seek reversal of any adverse judgment. See the appeal and certiorari rights exercisable by interveners in *International Union* v. *Eagle-Picher Mining Co.*, 325 U.S. 335, 338-339; *United States* v. *California Co-operative Canners*, 279 U.S. 553, 559; and *Fishgold* v. *Sullivan Drydock Corp.*, 328 U.S. 275, 283. Where, as in this case, the rights of an absent party are being adjudicated, the only way such a party can protect itself against an adverse judgment is to intervene and seek a reversal on appeal. Where such a substantive "right of his own" is involved, *Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249, 255, a person's right to appeal—exercisable in this context only by an intervener—is an essential part of the due process right to a fair and full hearing.

An *amicus curiae*, on the other hand, has no appeal rights. Not being a party of record, he has no standing to seek to appeal or to apply for certiorari from any adverse judgment affecting his interests. *In re Leaf Tobacco Board*, 222 U.S. 578; *Ex parte Cutting*, 94 U.S. 14. In this critical sense, "an intervener must be sharply distinguished from a mere *amicus curiae* or a person who has been heard but has never intervened." 4 Moore's Federal Practice 104 (2nd ed., 1963). The *amicus curiae* rights, in short, are the products of the sufferance of the court rather than the products of due process considerations.

Hence the equitable and due process demands which of necessity underlie the review procedure of § 10(f) inescap-

[18] Rule 25, United States Court of Appeals for the Seventh Circuit.

ably lead to a recognition of an absolute right on the part of the petitioner Union to intervene upon request in the proceedings below. Only in that way can there be any assurance that the interests of the petitioner Union will be fully represented and that the Union will be fully enabled to protect itself against any adverse judgment directly affecting its interests.

C. *Read In Conformity With Practical Considerations, the Judicial Review Procedures Should Be Construed To Require Intervention, Upon Request, By a Party Charged With Violation of the Labor Act.*

Long ago, in a related context, this Court noted that "The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review", and that "The purpose of the judicial review is consonant with that of the administrative proceeding itself —to secure a just result with a minimum of technical requirements". *Ford Motor Company* v. *Labor Board*, 305 U.S. 364, 369, 373.[19]

Permitting intervention at this point would "secure a just result with a minimum of technical requirements". Denial of intervention would prevent "simplicity and directness both in the administrative procedure and on judicial review".

To allow intervention to the petitioner at this stage of the proceedings is to avoid multiplicity of litigation and especially to avoid a second and meaningless litigation. The

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[19] There, this Court affirmed the denial of a motion by the Ford Motor Company (which had filed a cross-appeal) to vacate an order granting the Board's motion to withdraw its petition for enforcement. This Court commented that "While in the instant case there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned". 305 U.S. at 370.

petitioner—if denied intervention and if adversely affected by an appellate reversal of the Board's order—would be an "aggrieved party" free to seek a subsequent review of an adverse Board order entered on remand from the appellate court. Judicial time and energy would then be expended in pursuit of issues already resolved in the instant appeal. Allowance of intervention in the first porceeding would eliminate the need for such a fruitless proceeding by permitting the petitioner to be heard once and for all and the issues of fact and law to be resolved fully and more intelligently in the light of the contentions of all interested parties. A more speedy disposition of the basic controversy is thus assured by intervention at this juncture. In the words of the Solicitor General,[20]

> ". . . if the court reverses the Board's dismissal order, the party against whom the complaint was issued stands to incur a liability. Although this would not occur until after a separate judicial proceeding was instituted against that party [i.e., after an unfair labor practice order had been issued against the party pursuant to the appellate reversal and after the Board had filed a petition to enforce that order under § 10(e)] as a practical matter the second proceeding would be controlled by the facts found and the legal conclusions reached in the first proceeding. The Board believes that these considerations entitle the respondent before it to intervene in a review proceeding brought by the charging party, and therefore has not opposed timely motions to intervene in such circumstances."

In other words, the proceedings presently pending before the Court of Appeals below will undoubtedly result in a

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[20] Memorandum for the National Labor Relations Board, pp. 2-3, filed in this case in connection with the Petition for a Writ of Certiorari.

definitive determination of the petitioner's right under § 8(b)(1)(A) to execute its rule relative to incentive pay ceilings. That ruling, while not technically partaking of *res judicata* as respects the absent petitioner,[21] will have a highly influential if not decisive impact upon any and all future proceedings. If the ruling be adverse to petitioner's interest, that impact will be a prejudicial one, difficult and probably impossible to overcome from the petitioner's standpoint. The issues of fact will have been resolved and the legal and statutory problems will have been answered for all practical purposes in the instant review proceedings. And subsequent litigation as to those crucial matters would be form without substance.

Any suggestion that such an "ex post facto" judicial hearing suffices to protect the rights of the presently absent party is repelled by this Court's ruling in *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327, 330-331. There the Court rejected the argument that the right of applicant A to a hearing was not infringed by denial of A's participation in a prior administrative proceeding involving applicant B, when the grant of a license to applicant B would preclude the subsequent grant of a license to applicant A. In the Court's words: "We do not think it is enough to say that the power of the Commission to issue a license on a finding of public convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right of a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing." 326 U.S. at 330. The Court then noted that once a competing and mutually exclusive license is granted to an opponent, an opposing

[21] The ruling would not technically be *res judicata* only because of the failure of the respondent employees to name the petitioner as a party in the appellate proceedings.

party carries a burden in the subsequent proceeding "which cannot be met" because it makes "its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent." 326 U.S. at 331. Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 420-423.

And so in this case, the petitioner Union would have an intolerable burden, "which cannot be met," of seeking at the subsequent proceeding a rehearing and reversal of the conclusions reached in the instant proceeding. The subsequent proceeding would indeed become "an empty thing". While the *res judicata* principle would not foreclose such an empty procedure, here as in *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F. 2d 387, 394 (App. D.C).,[22] where "actions [have been] brought by a private person to have an order or regulation of an administrative agency adjudged invalid, the *res judicata* test for determining whether an applicant for intervention in the action will be bound by the judgment therein is unworkable and inappropriate. This, because . . . a judgment invalidating the order or regulation will result in substantial injury to those deriving direct benefit therefrom and will be as final and conclusive to them as if they were bound by it under the doctrine of *res judicata* and no remedy will be open to them to redress the loss they will suffer because of such judgment."

Precisely that consideration led the Court of Appeals for the District of Columbia Circuit in *Textile Workers*

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[22] In the *Atlantic Refining Co.* case, the Court held that a refiner had an absolute right to intervene in District Court proceedings, brought by Standard Oil Co., testing the legality of oil import regulations issued by the Secretary of the Interior, inasmuch as the refiner would have no remedy against Standard should Standard succeed in upsetting the regulations which were beneficial to the refiner.

Union of America v. *Allendale Co.*, 226 F. 2d 765, 769-770, to permit a union to intervene as of right in lower court proceedings brought by employers to review and set aside certain prevailing wage determinations, particularly since "Multiplicity of suits can be avoided by settling such related controversies in a single action." If the union were excluded from this action, said the court, it would "eventually bring the controversy back to court to assert the position they ask to present now. The same issues, both of law and fact, would be involved . . . The interventions sought here would serve the ends of justice. They would also promote judicial and administrative convenience by avoiding a multiplicity of proceedings and by bringing to the aid of the tribunal the parties who 'may know the most facts and can best explain their implications.'" See also *Wolpe* v. *Poretsky*, 144 F. 2d 505, 508 (App. D.C.); *Champ* v. *Atkins*, 128 F. 2d 601 (App. D.C.); *Brotherhood of Locomotive Engineers* v. *Chicago, M., St. P. & P. R. Co.*, 34 F. Supp. 594 (E.D. Wis.).

Closely allied with the practical desirability of allowing intervention in order to allow all parties to be heard at one time and to avoid mutiplicity of litigation (particularly of the empty variety) is the fact that intervention assures that the possibility of review by this Court of any adverse determination will be fully explored and exhausted at a point where such review would be most meaningful. As an intervener, the petitioner Union could of course seek certiorari from an adverse determination by the Court of Appeals. *International Union* v. *Eagle-Picher Mining Co.*, *supra*. And it could do so at the juncture where all parties —the Board, the charging party and the charged party— could be fully heard as to all issues, unencumbered and undiluted by any prior judicial determinations where the charged party was absent. A more satisfactory judgment

could then be rendered by this Court as to the appropriateness of reviewing such fully-developed issues.

On the other hand, denial of intervention at this stage might impinge upon the clarity and development of the issues open to review by this Court and might, for fortuitous reasons, make such review impossible. This Court has announced a policy in original actions before this tribunal that the effective determination of issues "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana*, 354 U.S. 515, 516. And "to that end," the Court in the *Louisiana* case allowed four States directly concerned with the litigation to intervene. A similar policy would appear applicable in the instant case in order to promote a more effective resolution of certiorari proceedings. To deny intervention in the court below to an interested party and to force him to seek a subsequent appellate and certiorari review of issues already resolved in the earlier proceeding is to weaken the development of issues available for certiorari review in both the earlier and the subsequent proceedings. In the earlier case, the denial of intervention means that an intimately interested party (the party charged with a Labor Act violation) cannot seek certiorari from this Court or appear before it as a full-fledged party; and in the second case, such a party is remitted to the intrinsically weak position of seeking certiorari to review issues already resolved in an earlier proceeding. Moreover, in this second case the charging party, who earlier prevailed, might well be denied intervention. The consequence is that in neither review proceeding would all the interested parties be present, although both proceedings are "essentially one so far as any question as to

the legality of the Board's order was concerned". *Ford Motor Company* v. *Labor Board*, 305 U.S. at 370.

Indeed, intervention in this situation may be the only way of assuring that this Court can effectively assess the reviewability and ultimately dispose of the issues resolved and developed below. If a decision adverse to the Union is rendered by the Court of Appeals and the Board's order is reversed, the Board or the Solicitor General may decide not to seek certiorari from this Court. Thus in *United Steelworkers* v. *Labor Board*, 376 U.S. 492, the Court of Appeals for the Second Circuit had reversed the Board's determination exonerating the union's conduct from the proscriptions of § 8(b)(4)(B) of the Act. The union, which had been allowed to intervene in the Court of Appeals, then sought and obtained certiorari from this Court, resulting in a unanimous reversal of the judgment of the Court of Appeals on this issue. The Board, however, had not itself sought certiorari in that case. And it declined to do so, as it explained to this Court, "because the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government can properly ask this Court to review."[23] Had the union been denied intervention in the *United Steelworkers* case, it could not have sought certiorari and the Solicitor General's determination—unrelated as it was to the erroneousness of the Second Circuit's decision—would have ended the case.

Intervention may thus have an intimate relation to the effectuation of appeal and certiorari rights and to the judicial consideration of fully developed issues. Professor Moore has noted that the whole concept of intervention,

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[23] Memorandum for the National Labor Relations Board, p. 2, filed in connection with the union's petition for certiorari, *United Steelworkers* v. *Labor Board*, 376 U.S. 492, No. 89, Oct. Term 1963.

as first developed in the civil, the ecclesiastical and the admiralty courts, was historically related to the perfection of the appeal rights of the absent but affected individual. "Apparently, intervention in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal and the petitioner's interest thus be inadequately protected." 4 Moore's Federal Practice 9 (2d ed., 1963). This historical theory of intervention has its counterpart in modern federal practice.[24] Thus, in a Labor Board case, for example, the Sixth Circuit was persuaded to grant intervention to individual employees subsequent to the entry of a judgment setting aside a Board order awarding them reinstatement and back pay. *N.L.R.B.* v. *Johnson*, 322 F. 2d 216 (C.A. 6). The employees, who had not been represented theretofore in the appellate proceedings, were allowed to intervene "for the purpose of perfecting an appeal to the Supreme Court."[25]

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[24] In *National Coal Association* v. *F.P.C.*, 191 F. 2d 462, 467 (App. D.C.), fairness was said to require that a potentially aggrieved person be allowed to intervene in administrative proceedings to enable that person to seek judicial review, where such review was available only to parties before the agency who were "aggrieved" by its order. And in *American Communications Association* v. *United States*, 298 F. 2d 648, 650-651 (C.A. 2), fairness was held to require intervention by an interested party before an agency from the outset of the administrative proceedings —thereby allowing the intervener to participate fully in the proceedings— "in order to make the right to [judicial] review effective." Only by such intervention could the intervener fully develop the issues he might have available should he ultimately seek judicial review.

More recently, in *Northeast Airlines, Inc.* v. *C.A.B.*, 345 F. 2d 488, 489-490 (C.A. 1), the court, after having remanded the case to the agency for further proceedings and then holding that the new administrative order was discretionary and not subject to review, allowed intervention by two competing carriers solely in order to permit them to seek review by certiorari in this Court. The court had previously denied intervention to the carriers in the original review proceeding "so long as these carriers are precisely aligned with the Board." 345 F. 2d at 489.

[25] The order allowing intervention is not reported. It was entered on Nov. 29, 1963, in *N.L.R.B.* v. *Johnson*, No. 15,031 (C.A. 6). See Petition

Intervention in the context here described thus works to make more meaningful the ultimate review powers of this Court and to give to the most directly affected party the opportunity to apply for certiorari when the issues are most ripe and fully developed for consideration, and with all parties before the Court.

Finally, the ultimate anomaly of intervention denial to a prevailing respondent before the Board is the disadvantage he may suffer by his own success before the agency. Where the charged party *loses* before the Board, he may as an "aggrieved" party seek review as a full-fledged party in the court of appeals; and in that capacity he may seek or oppose this Court's ultimate review of the case. But as a *prevailing or winning party* before the Board, if he is not named as a respondent in the appellate court and if he is then denied intervention in that court, he cannot participate as a party there or before this Court and he may neither seek nor oppose this Court's grant of review.

The right of a person, accused before a federal agency of having violated a provision of federal law, to participate in the judicial review of the agency proceedings against him is too fundamental for the fortuity of success before the agency to govern its observance. To read such fortuity into intervention rights under § 10(f) is to impute to Congress "a desire for incoherence" and "caprice" which the statutory language does not command. Cf. *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381, 394. Such a reading should not be sanctioned by this Court.[26]

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for Writ of Certiorari in *Taylor* v. *Johnson*, No. 795, Oct. Term, 1963. The employees' petition for certiorari was later denied by this Court. *Taylor* v. *Johnson*, 376 U.S. 951.

[26] An additional element of fortuity now exists by reason of the conflicting policies of the various courts of appeals respecting intervention by prevailing parties, charged before the Board with committing unfair labor practices. The Seventh and First Circuits uniformly deny such intervention, while most other Circuits, including the District of Columbia,

In sum, there are intensely practical reasons why the allowance of intervention to a party like the petitioner Union would promote the effective and fair execution of § 10(f) review proceedings: (1) intervention would centralize the entire controversy and limit it to one appellate review proceeding, eliminating the need for the absent party to seek another and doubtless futile review should the original Board order be reversed; (2) intervention would assure that all interested parties—and particularly the party against whom relief is sought—will be heard together; (3) intervention would assure that all factual and statutory issues will be developed as fully as possible and in light of the contentions of all interested parties; (4) intervention would assure that the certiorari review powers of this Court will be invoked and exercised at that point where the issues are most fully developed and where all parties can be heard; and (5) intervention in these circumstances would eliminate the fortuitous element of success or defeat before the Board as the determinant of the right of the accused party to participate in the appellate proceedings. In short, intervention is both fair to the party most directly concerned with the Board order and of substantial assistance to the effective judicial administration of § 10(f). The only rational Congressional intent that can be deduced from § 10(f) is one that reaches this result.

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permit intervention. A prevailing respondent's right to intervene thus depends at the moment upon the Circuit in which the aggrieved party seeking review under § 10(f) has his residence or place of business so as to be able to file a petition for review in that Circuit; and since the aggrieved party can in any event file his petition in the District of Columbia Circuit, that fortuitous choice would make intervention possible regardless of the policy of the Circuit wherein the aggrieved party resides.

D. *Read in* Pari Materia *With Comparable Legislation, the Judicial Review Procedures Should Be Construed to Require the Right of Intervention and Participation By the Charged Party.*

When, as here, the statute is silent on the question of intervention, Congressional intent may be gleaned from like statutes dealing with like problems, especially, as here, when the legislative history of subsequent analogous review provisions makes explicit reference to the review procedure of the National Labor Relations Act.[27]

5 U.S.C. § 1038 is a subsequent statute dealing with the review of administrative orders. It sheds light on the Congressional intent in the Labor Act review provisions because it makes special reference in the statute to the problem of intervention and in the legislative history to the procedures under the National Labor Relations Act.

Prior to 1950 the orders of certain federal agencies[28] were reviewable by three-judge district courts in accordance with the pattern established by the Urgent Deficiencies Act of 1913 (see 28 U.S.C. § 2284, as amended); an appeal as of right could then be made to this Court. In 1950 this pattern was altered by substituting judicial review in the first instance by an appropriate court of appeals, followed by further review by this Court in accordance with cer-

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[27] Cf. *Labor Board* v. *Local Union No. 639* (Curtis Bros.), 362 U.S. 274, 291-292: "To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit".

[28] The orders were those of the Federal Communications Commission under the Communications Act of 1934, the Secretary of Agriculture under the Packers and Stockyards Act and the Perishable Commodities Act, and the United States Maritime Commission under the Shipping Act and the Intercoastal Shipping Act.

tiorari standards. See 5 U.S.C. §§ 1031-1042.[29] Congress in this legislation purported to adopt "the pattern established for review of orders of the Federal Trade Commission . . . and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the *National Labor Relations Board.*"[30] (Emphasis added.)

In establishing this pattern of judicial review, modeled, as the House Report said, after the procedures created by the National Labor Relations Act among others, Congress included a specific provision regarding intervention in the courts of appeals by private parties directly affected by the agency orders. This provision, 5 U.S.C. § 1038, reads in its entirety as follows:

> "The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and *any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right,* and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but

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[29] The agency orders covered by this legislation included not only those mentioned in footnote 28, *supra*, but also those of the Atomic Energy Commission made reviewable by 42 U.S.C. § 2239. See 5 U.S.C. § 1032.

[30] H. Rep. No. 2122, p. 4, accompanying H.R. 5487, 81st Cong., 2d Sess. (1950); 2 U.S. Code Congressional Service, 81st Cong., 2d Sess. (1950), 4306.

said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or non-action of the Attorney General therein." (Emphasis added.)

This intervention provision bears a strong resemblance to an even earlier provision of federal law, 28 U.S.C. § 2323, dealing with judicial review of Interstate Commerce Commission orders. That provision states that "The Interstate Commerce Commission and *any party or parties in interest to the proceeding before the Commission*, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party." (Emphasis added.) See *Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249; *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153 (S.D.N.Y.), affirmed 338 U.S. 802.

Congress has thus exhibited its concern that private parties in interest be given an unqualified right to intervene and participate in the appellate review proceedings involving the specified agency orders. The content of 5 U.S.C. § 1038, like the other portions of the 1950 legislation, was "evolved from long study and careful consideration by all persons concerned with the difficult questions involved," and was said to represent "an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal courts."[31]

The broad intervention policy adopted by Congress in these statutes must be viewed as grounded upon all the considerations of equity, fairness and due process which

[31] H. Rep. No. 2122, p. 5, *supra*, footnote 30; 2 U.S. Code Congressional Service, 81st Cong., 2d Sess. (1950), 4307.

have heretofore been discussed. And it becomes reasonable to inject that policy into a judicial review provision that is silent on the subject of intervention. Indeed, it would be irrational not to adopt this legislative policy when interpreting and applying such provisions as § 10(f) of the National Labor Relations Act.[32] For that policy not only is the major Congressional expression on this matter but is consistent with the demands of due process and equity—which must in any event be imputed to Congressional legislation otherwise silent on the matter.

E. *The Analogy of the Federal Civil Rules Favors Intervention Here*

The Federal Rules of Civil Procedure generally apply only to procedures in the federal district courts. But the principles set forth therein—particularly in Rules 19 and 24—provide useful analogies in the fair execution of the appellate review procedures contemplated by § 10(f) of the National Labor Relations Act, as amended.[33] Those

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[32] Section 10(f), enacted in 1935, was not altered or discussed in the 1947 Taft-Hartley Amendments. However, an entirely new judicial provision was added to the Act in 1947. Section 10(1) requires the Labor Board, under certain circumstances, to seek District Court injunctive relief against certain types of union unfair labor practices. Senator Taft explained that in these judicial proceedings the Labor Board acts "in the public interest and not in vindication of purely private rights". Legislative History of the Labor Management Relations Act, 1947, at p. 414. Nonetheless, Section 10(1) expressly provides that "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given opportunity to appeal by counsel and present any relevant testimony". This is legislative recognition of the need for representation by all interested parties in the judicial procedures to vindicate "the public interest".

[33] Section 10(f) provides that the person "aggrieved" by a Labor Board order may appeal to any of several designated Courts of Appeals. Section 10(e) provides that the Labor Board may seek enforcement of its orders in these same Courts of Appeals, or, if these Courts of Appeals "are in vacation, any district court of the United States, within any

principles supplement the considerations heretofore discussed and give assurance that it is consistent with the effective and fair administration of justice to recognize an absolute right to intervene under § 10(f) by a party charged with having committed an unfair labor practice.

Rule 19(a) deals with the necessity of joining as parties to a controversy "persons having a joint interest" therein. The concept of indispensability contained in Rule 19(a) "goes beyond federal jurisdiction and touches the very power or the right of the court to make an equitable adjudication, where an indispensable party is not before it." 3 Moore's Federal Practice 2146 (2d ed., 1964).

The equitable considerations underlying the need for joining indispensable parties, as recognized by Rule 19(a), are precisely the same considerations previously discussed concerning the due process requirements of permitting appellate intervention by a party whose interests are directly at stake. The governing principle of Rule 19(a) was long ago established by Mr. Justice Curtis in *Shields v. Barrow*, 17 How. 130, 136, when he said that "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties. Persons who not only have

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circuit . . . wherein the unfair labor practice in question occurred . . .". As a theoretical matter, then, the District Courts have potential jurisdiction to review Labor Board orders. But as that did not happen in this case, nor, as far as research indicates, in any other case, the Federal Rules of Civil Procedure are discussed by way of analogy only.

an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and in good conscience" are indispensable parties. See also *Williams* v. *Bankhead*, 19 Wall. 563, 572; *Horn* v. *Lockhart*, 17 Wall. 570.

While there is "no prescribed formula for determining in every case whether a person or a corporation is an indispensable party or not," *Niles-Bement-Pond Co.* v. *Iron Moulders' Union*, 254 U.S. 77, 80, by any standard a union would be an indispensable party to an action adjudicating its statutory liability or obligation. Had it been possible for the respondent employees to bring an action in a federal district court, seeking a declaratory judgment or an order respecting the Union's alleged violation of § 8(b)(1)(A), this Court's policy "under which indispensability of parties is determined on practical considerations," *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54, would have required the joinder of the Union as a party defendant pursuant to Rule 19(a). Such practical considerations as the Union's direct interest in the suit, the obvious prejudice to the Union should an order be entered against it, and the plain inequity of resolving such a claim in the absence of the Union would all combine to require joinder, quite apart from due process considerations. Cf. *White* v. *Douds*, 80 F. Supp 402 (S.D.N.Y.); *Interstate Commerce Commission* v. *Blue Diamond Products Corp.*, 192 F. 2d 43, 46-47 (C.A. 8). No different result should follow in an appellate court proceeding under § 10(f).

In a sense, intervention by an indispensable party in an appellate court is a counterpart of joinder of an indispensable party in a district court under Rule 19(a). Both procedures are designed to eliminate the inequity and unfairness involved in adjudicating the direct interests of

an absent person and to insure that such a person has a full day in court and a full right to appeal from any adverse decision affecting his interests.

Equally analogous are the provisions of Rules 24(a)(2)[34] and 24(b)(2)[35] of the Federal Rules of Civil Procedure. Rule 24(a)(2) recognizes an absolute right to intervene in district court actions where the existing representation of the applicant's interest may be inadequate and where the applicant may be bound by a judgment in the case; Rule 24(b)(2) deals with permissive intervention in situations where "an applicant's claim or defense and the main action have a question of law or fact in common." By either standard, petitioner would be permitted intervention. Certainly there is a common question of law or fact (Rule 24(b)(2)); and, equally certainly, petitioner for all practical purposes would be bound by the judgment in the case, and the existing representation of petitioner's interest by the Labor Board "may be inadequate". (Rule 24(a)(2)).

These provisions of Rule 24 have been said by this Court not to be "a comprehensive inventory of the allowable instances for intervention." *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S. 502, 505. But they do reflect a policy that "where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." *Ibid.,* 506.

Thus these intervention rules indicate a broad policy

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[34] Rule 24(a)(2) provides that "Upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

[35] Rule 24(b)(2) provides for permissive intervention, *inter alia,* "when an applicant's claim or defense and the main action have a question of law or fact in common."

favoring if not commanding intervention where the applicant is directly concerned with public law litigation and may be bound or vitally affected by the question of law or fact to be resolved. It was that policy, coupled with the feeling that an applicant having a vital interest "should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown," that led the Court of Appeals for the District of Columbia Circuit to declare in *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765, 770, that the lower court had abused its discretion under Rule 24 in denying intervention to a union directly concerned with the validity of the administrative determination under attack.

The basic principle of allowing intervention under Rule 24 in order to safeguard private interests in the course of enforcing a public law is fully applicable to the intervention problem in an appellate court.[36] That principle, similar in purport to the indispensable party concept, is designed to eliminate the unfairness and inequity in resolving private interests in the absence of the private party. And the fact that the public interest, represented by the administrative agency, is simultaneously being adjudicated does not detract from the need of intervention in such a situation. The private interest, the interest of the union in the judicial declaration of its violation or non-violation of federal law, is certain to be affected and to be bound by the outcome of the litigation. Unlike *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689-690, where the private parties were not bound by government litigation and hence had no intervention rights therein, the instant case is a classic example of private conduct being the very focal point of the government litigation and inevitably bound

[36] See *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 524-525 (C.A. 3), where the Rule 24 intervention principles were applied to an intervention problem arising in an original proceeding in that court.

by it. Intervention would seem to be a matter of right under the compelling analogy of Rule 24.

Conclusion

When all the dictates of due process and equity, the practical considerations, the analogies of the Federal Civil Rules and the general policy of Congress regarding intervention lead to the conclusion that intervention should be allowed as of right to a charged party, it is reasonable to read § 10(f) as incorporating that right. Nothing Congress has said or done indicates any purpose to deny appellate courts the power to permit such intervention or to deny applicants the absolute right to intervene to defend their own vital interests.

Thus, as a matter of fair construction of § 10(f) and in the exercise of this Court's "general power to supervise the administration of justice in the federal courts," *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260, the order of the court below denying intervention should be reversed with directions to permit the petitioner Union to intervene in the appellate proceedings as of right and as a full-fledged party.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 18

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 283, PETITIONER

v.

RUSSELL SCOFIELD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 53

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, PETITIONER

v.

THE FAFNIR BEARING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals rendered no opinion in No. 18. The opinion of the court of appeals in No. 53 (R.-53, 16-22)[1] is unreported. The underlying Board decisions and orders in the two cases are reported at 145 NLRB 1097 and 146 NLRB 1582, respectively.

JURISDICTION

No. 18: The order of the court of appeals denying intervention was entered on September 16, 1964 (R.-18, 8), and a petition for reconsideration was denied on October 6, 1964 (R.-18, 15). The petition for a writ of certiorari was filed on November 4, 1964, and was granted on January 18, 1965 (R.-18, 16; 379 U.S. 959). The Court has jurisdiction under 28 U.S.C. 1254(1).

No. 53: The order of the court of appeals denying intervention was entered on December 24, 1964 (R.-53, 22). The petition for a writ of certiorari was filed on February 5, 1965, and granted on March 29, 1965 (R.-53, 23; 380 U.S. 950).[2] The Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The question presented in No. 18 is whether, where the National Labor Relations Board has dis-

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[1] The record in No. 18 will be designated "R-18," and that in No. 53, "R.-53."

[2] The Court set the case for oral argument immediately following No. 18.

missed an unfair labor practice complaint and the party who filed the charges that led to the complaint petitions the court of appeals to review the dismissal action, the respondent before the Board should be permitted to intervene as a party in the review proceeding.

2. The question presented in No. 53 is whether, where the Board has issued an unfair labor practice order against the respondent and he petitions the court of appeals to review that order, the successful charging party should be permitted to intervene as a party in the review proceeding.[3]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A (pp. 38-43, *infra*).

STATEMENT

A. The proceedings in No. 18

Upon charges filed by certain employees of the Wisconsin Motor Company, the General Counsel of the Board issued a complaint against Local 283 of the United Automobile Workers. The complaint alleged that the Union had violated Section 8(b)(1)(A) of the Act by fining its members for exceeding produc-

[3] A similar question is presented in *International Union of Electrical Workers* v. *National Labor Relations Board and General Electric Co.*, No. 87, this Term, pending on petition for certiorari.

tion ceilings established by a union rule and by bringing civil suits for the collection of such fines. After a hearing, the trial examiner concluded that the imposition and collection of the fines did not violate Section 8(b)(1)(A) and recommended that the complaint be dismissed. The Board (one Member dissenting) sustained the trial examiner and entered an order of dismissal. 145 NLRB 1097.

Pursuant to Section 10(f) of the Act, the charging parties filed a petition to review the Board's order in the Court of Appeals for the Seventh Circuit (R.-18, 1-4). The Board filed an answer urging that the petition be denied (R.-18, 4-5). Local 283, the successful respondent before the Board, filed a motion, to which both the Board and the charging parties consented, to intervene in the review proceeding (R.-18, 6-7). A single judge of the court of appeals denied the motion to intervene, and authorized the Union to file a brief as *amicus curiae* but not to participate in the oral argument (R.-18, 8). The Union petitioned for reconsideration by the court *en banc* or by a division thereof (R.-18, 9-14). A division of the court denied the petition (R.-18, 15).

B. The proceedings in No. 53

Upon charges filed by Local 133 of the United Automobile Workers, the General Counsel of the Board issued a complaint against The Fafnir Bearing Company. The complaint alleged that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to permit the Union to conduct independent time studies on jobs involved in grievances

that had arisen under the parties' collective bargaining agreement. After a hearing, the trial examiner concluded that the Company had not committed an unfair labor practice and recommended that the complaint be dismissed. The Board (with one Member dissenting) reversed the trial examiner and held that the Company had violated the Act as alleged in the complaint. The Board entered an order requiring the Company to cease and desist from the unfair labor practice found and to permit the Union, upon request, to perform its own time study on the jobs involved in the grievances in issue. 146 NLRB 1582.

Pursuant to Section 10(f) of the Act, the Company filed in the Court of Appeals for the Second Circuit a petition to review the Board's order against it (R.-53, 1-6). The Board, pursuant to Section 10(e), filed a cross-petition for enforcement (R.-53, 7-8). The Union, the successful charging party, moved to intervene in the proceeding (R.-53, 9-12). Both the Board and the Company opposed the motion (R.-53, 13-14, 15). The court of appeals denied the Union's motion to intervene, but authorized it to file a brief as *amicus curiae* (R.-53, 16-22).

SUMMARY OF ARGUMENT

Sections 10(e) and (f) of the National Labor Relations Act, which govern judicial review of orders issued by the Labor Board under the Act, provide that the Board and "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" are parties to the judicial

review proceeding. If the order of the Board dismisses the complaint or denies adequate remedial relief, the person who filed the unfair labor practice charge with the Board [4] is deemed aggrieved; if the Board enters a remedial order, the respondent in the Board proceeding is aggrieved. The statute is silent with respect to participation in judicial review proceedings by persons not aggrieved, and the question presented by these two cases is whether and in what circumstances persons directly affected but not aggrieved by Board orders—the charging party, if the Board grants adequate relief (No. 53), and the respondent, if the Board orders the complaint dismissed (No. 18)—should be permitted to intervene and participate as parties in the judicial review proceeding. No statute or rule of procedure answers this question. This Court, in the exercise of its supervisory authority over the procedures of the federal courts, can, drawing on the basic policy and objectives of the National Labor Relations Act, formulate a sound, workable and fair rule governing such intervention.

The basic thrust of the Act is to establish an administrative agency for the prevention of labor practices that are unfair and harmful to the public, rather than to vindicate or protect purely private rights or interests. The decision whether to institute a proceeding under the Act is exclusively the Board's;

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[4] Under the Act, an unfair labor practice proceeding is initiated by the General Counsel of the Board on the basis of a charge filed by a member of the public (irrespective of the nature of his interest in the matter). Such a person is known as the "charging party".

the charging party can neither institute such a proceeding himself nor compel the Board to do so. The General Counsel of the Board has exclusive authority to define the issues in the proceeding and both he and the Board may settle the case without the consent of the charging party. If the Board finds a violation and issues a remedial order, it has exclusive authority to decide whether to seek court enforcement or accept informal compliance with its order, and whether to prosecute violations of a court enforcement decree. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. Under the statutory scheme, then, exclusive responsibility for administering the Act is vested in the Board, and so the propriety of intervention in any stage of an unfair labor practice proceeding by a person not entitled by the statute to participate as a "person aggrieved" should depend on how such intervention would affect the exercise of that responsibility.

Judged by this standard, intervention by a successful charging party should be denied, but intervention by a successful respondent should be granted. In the former case, the result of permitting intervention would be that a private person—the charging party—could block a settlement of the case that the Board deemed in the public interest, or petition for certiorari despite the Board's belief that further proceedings would not be in the public interest. Neither of these substantial dangers to the integrity of the statutory pattern is presented by intervention of a successful respondent. He, unlike a successful charging

party, is not the incidental beneficiary of a Board order issued to prevent a labor practice that is unfair and injurious to the public, but the person against whom the Board is seeking to impose a sanction. He could in no event be prevented from seeking review in this Court of a subsequent court decision upholding a Board order against him; nor could the case be compromised without his consent.

We urge this Court to formulate a rule permitting the successful respondent before the Board, but not the successful charging party, to intervene in Labor Board review proceedings. We do not argue that the same rule would be appropriate in the case of other government agencies operating under different statutory schemes. The question of the scope of intervention in judicial review proceedings should, in the absence of explicit statutory provision, be determined with reference to the particular purposes, objectives, and practical problems of each agency, which, of course, vary considerably.

ARGUMENT

I

No Statutory Provision or Rule of Procedure Confers on the Successful Charging Party or Successful Respondent a Right to Intervene in Court of Appeals Proceedings to Review Labor Board Orders

The judicial review provisions of the National Labor Relations Act do not provide for the participation of a private beneficiary of the Board's order. Section 10(e) empowers the Board to petition the appropriate court of appeals for enforcement of orders en-

tered by it and provides that "the court shall cause notice" of the filing of the petition "to be served upon" the person charged with the unfair labor practice (*i.e.*, the respondent before the Board). Similarly the companion review provision, Section 10(f), provides for the filing of a petition by "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," and adds that "[a] copy of such petition shall be forthwith transmitted by the clerk of the court to the Board." These sections contemplate two parties to court of appeals proceedings—the Board and the person aggrieved by the Board's order. Where the Board finds an unfair labor practice, the person aggrieved is the respondent before the Board; where the Board dismisses an unfair labor practice complaint, the person aggrieved is the charging party before the Board.[5] The Act makes no provision for joinder or intervention of any other person.[6]

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[5] See *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652, 653-655 (C.A. 7); *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 100 (C.A. 3).

[6] Accordingly, when someone other than the Board has been joined as a party-defendant to a petition to review, Board motions to strike that party have uniformly been granted. See, *e.g.*, *Cafero* v. *National Labor Relations Board*, 336 F. 2d 115 (C.A. 2) (unreported order granting motion to strike employer and union); *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 190 F. 2d 45, 48-49 (C.A. 7); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575 (C.A. 3) (unreported order); *Galina* v. *National Labor Relations Board*, 55 LRRM 2170 (C.A. 9); *Amalgamated Meat Cutters* v. *National Labor Relations Board*, No. 18,278 (C.A. D.C.) (unreported order).

The rules of the courts of appeals are silent on when intervention will be allowed in the absence of express statutory authorization; they provide simply that "[a] person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene" (C.A. 2, Rule 13(f); C.A. 7, Rule 14(f); see R-53, 18). Rule 24(a)(2) of the Federal Rules of Civil Procedure permits intervention as of right in an action "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." But the Federal Rules, which govern district court proceedings, are not applicable to the courts of appeals; and since very different considerations may apply with respect to the propriety of intervention in court of appeals as against district court proceedings, Rule 24(a)(2) has only limited bearing, even as an analogy, on the present problem. Moreover, even in district court cases, it has been recognized that the provisions of Rule 24, "[o]bviously tailored to fit ordinary civil litigation, * * * require other than literal application in atypical cases. Administrative cases * * * often vary from the norm." *Textile Workers Union* v. *Allendale Co.*, 226 F.2d 765, 767 (C.A. D.C.), certiorari denied, 351 U.S. 909. *A fortiori*, Rule 24 should not be deemed controlling in court of appeals proceedings to review administrative action.

II

The Design and Objectives of the National Labor Relations Act and Considerations of Procedural Fairness, Economy, and Convenience Support a Distinction Between the Successful Respondent, Who Should be Permitted to Intervene in Judicial Review Proceedings, and the Successful Charging Party, Who Should Not

Since no statute or rule explicitly creates a right of intervention in the circumstances involved in these cases, whether such right exists depends upon the general scheme and purposes of the National Labor Relations Act, considered in light of basic principles of procedural fairness, economy, and convenience. In the case of the successful respondent, it has been the general practice of the courts of appeals, including the Seventh Circuit, to permit intervention.[7] The

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[7] See, *e.g.*, *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138 (C.A. 7); *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C.A. 7); *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 190 F. 2d 45, 48-49 (C.A. 7); *Amalgamated Clothing Workers* v. *National Labor Relations Board*, 324 F. 2d 228 (C.A. 2); *Industrial Union of Marine & Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3); *Selby-Battersby & Co.* v. *National Labor Relations Board*, 259 F. 2d 151 (C.A. 4); *Darlington Mfg. Co.* v. *National Labor Relations Board*, 325 F. 2d 682 (C.A. 4); *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6); *Minnesota Milk Co.* v. *National Labor Relations Board*, 314 F. 2d 761 (C.A. 8); *Great Western Broadcasting Corp.* v. *National Labor Relations Board*, 310 F. 2d 591 (C.A. 9); *Local 1441, Retail Clerks* v. *National Labor Relations Board*, 326 F. 2d 663 (C.A. D.C.); *Teamsters Local 79* v. *National Labor Relations Board*, 325 F. 2d 1011 (C.A. D.C.). See also *Dargel* v. *Henderson*, 199 F. 2d 270 (Emerg. Ct. of App.). But see *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 267 F. 2d 169 (C.A. 1), certiorari de-

Seventh Circuit's decision in No. 18, denying intervention, is thus aberrational. In the case of the successful charging party, the courts' practice has been to deny intervention, as the Second Circuit did in No. 53; every court that has discussed the question has agreed with the Second Circuit's position.[8] We show

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nied, 361 U.S. 863; *Haleston Drug Stores* v. *National Labor Relations Board*, 140 F. 2d 1022 (C.A. 9).

The Second Circuit, in No. 53, while denying intervention to the successful charging party, recognized that the situation of the successful respondent was different. The court stated (R.-53, 19, n. 1):

> * * * the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

[8] *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 488 (C.A. 7). And see *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 132 F. 2d 801 (C.A. 7); *National Labor Relations Board* v. *Retail Clerks International Association*, 243 F. 2d 777, 783 (C.A. 9). In *Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, the charging parties were permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back pay and to substitute another method; thus, they were able to seek certiorari even though the Board had not. However, as the Second Circuit pointed out here (R.-53, 20), "nothing indicates that anyone had resisted intervention in the court of appeals, * * * and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself."

in this part of our brief why the distinction recognized by the courts—which reflects the consistent policy of the Board toward applications for intervention in judicial review proceedings—is sound, practical and fair and should be adopted by this Court, in the exercise of its supervisory authority over the procedure of the federal courts, to govern the courts of appeals in passing on such applications.

A. *Congress Established the Labor Board as the Exclusive Agency for Enforcing the Rights Created by the Act*

This Court, in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, pointed out a fundamental distinction among federal administrative agencies. Some are empowered to award valuable privileges or franchises, or to provide a private administrative remedy for conduct injuring a person or group. Thus, a shipper who feels he is the victim of unjust discrimination by a railroad is entitled to institute a proceeding against the railroad before the Interstate Commerce Commission. 309 U.S. at 268-269. The agency in this kind of case acts essentially as a tribunal for vindicating private rights. *Ibid.* But in establishing other agencies, notably the Federal Trade Commission and the Labor Board, Congress determined that the goal of vindicating the public interest (which may be different from the private interests affected by agency action) should be paramount, and that therefore exclusive responsibility for administering the law should be placed in the agency, free of control or direction by interested

private persons. As the Court explained in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25-26:

> Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.

In *Amalgamated Utility Workers* v. *Consolidated Eidson Co.*, *supra*, the Court held that, despite some differences in detail, the statutory pattern under which the Labor Board operates also makes vindication of the public interest the overriding concern, so that, while private interests may be affected by Board action (or inaction), the Act creates no right to a private administrative remedy.[9] To the same effect,

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[9] The public nature of the Board's order is further shown by the fact that, even where it awards back pay to an employee found to have been discriminatorily discharged, creditors of the employee may not garnish or attach the money due under the order until it has actually been paid over to the employee involved and has become his private property. *National Labor*

see *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362.

It follows that a right to intervene in a court proceeding to review Labor Board orders cannot properly be implied from the Act's design and purposes where permitting intervention would impede the Board in enforcing the Act in the public interest, even if a private interest would be advanced by permitting intervention. The holding of the *Amalgamated Utility Workers* case is controlling on this point. In that case, a labor organization had filed a charge with the Board against an employer, and the Board had entered a remedial order against him and obtained a court of appeals decree enforcing it. The original charging party later petitioned the court to adjudge the employer in contempt, alleging that he had disobeyed the decree. This Court held that such a petition was improper; that only the Board was empowered to institute proceedings for violation of the court's decree. To be sure, failure to institute such proceedings might result in depriving the charging party of such benefits as it may have derived from the existence of the order and decree. But this pri-

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Relations Board v. *Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9); *National Labor Relations Board* v. *Ozanne, Inc.*, 307 F. 2d 80 (C.A. 1). "The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public." *Agwilines* v. *National Labor Relations Board*, 87 F. 2d 146, 151 (C.A. 5). (But cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25.) Monetary awards ordered by the Board "vindicate public, not private, rights." *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

vate interest, the Court held, must be subordinated to the public interest, which required that the Board alone determine when and how to obtain compliance with its orders; the Board, for example, might believe that compliance could more readily be achieved through voluntary negotiations with the respondent than through institution of a contempt proceeding. Similarly, where permitting intervention in a judicial review proceeding would interfere with the Board's responsibility for administering the statute in the public interest, it should be denied even if a private party (whether the charging party, as in *Amalgamated*, or the respondent) is thereby denied a benefit or advantage he might be able to secure if he had the status of a party. Conversely, intervention should be allowed where it would facilitate the task of the Board in effectuating the statutory policy and objectives.

Petitioners attack the concept of the Labor Board as an agency exclusively for the vindication of the public interest in the prevention of unfair labor practices by pointing to certain features of the Board's procedures—having to do with the role of the charging party—which, they contend, are inconsistent with such a conception. (See petition for certiorari, No. 53, pp. 6-7.)

They point out, for example, that in Section 10(b) of the NLRA Congress made the filing of a charge with the Board a jurisdictional prerequisite to the issuance of a complaint. However, Sections 10(a) and (b) (see Appendix A, pp. 38-39, *infra*) make clear that the Board is not required, but

is merely "empowered," to act upon the charge. The charge is not a pleading and does not start a formal proceeding, but "merely sets in motion the machinery of an inquiry." *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 18; *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 307-308. If after investigation of the charge the General Counsel of the Board decides that there is not reasonable cause to believe that an unfair labor practice has been committed, or that a complaint would not be in the public interest, he may decline to issue a complaint, and his decision is not subject to judicial review. *E.g.*, *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A. D.C.), certiorari denied, 345 U.S. 930; *Bandlow* v. *Rothman*, 278 F. 2d 866 (C.A. D.C.), certiorari denied, 364 U.S. 909. If he decides that a complaint is warranted, it issues in the name of the General Counsel of the Board, the government bears the entire expense of the prosecution, and control of the proceeding remains in the hands of the General Counsel. The charging party cannot enlarge the scope of the complaint issued by the General Counsel (*International Union of Electrical Workers* v. *National Labor Relations Board*, 289 F. 2d 757, 759-762 (C.A. D.C.); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 578-588 (C.A. 3), certiorari denied, 364 U.S. 933); and, after a complaint has issued, the General Counsel and the Board may, over the objection of the charging party and without affording him an evidentiary hearing, settle the case on a basis that pro-

vides a lesser remedy than might have been obtained after full litigation.[10]

The role of the charging party in initiating Labor Board proceedings is essentially the same as that of the informant whose complaint initiates FTC proceedings, as discussed in the *Klesner* opinion (see p. 14, *supra*). He proposes, but only the Board (or Commission) can dispose. Unlike the complainant in unjust-discrimination proceedings before the ICC (see p. 13, *supra*), neither the charging party nor the FTC informant can compel agency action on his complaint, since neither the Federal Trade Commission Act nor the National Labor Relations Act creates any right to a private administrative remedy.

Section 10(b) of the NLRA (p. 39, *infra*) provides that persons other than the respondent may be allowed to intervene in Board proceedings,[11] and the Board has adopted a regulation [12] giving the charging party the status of a "party" before it. Thus, should the Board dismiss the complaint, he would have standing under Section 10(f), as a person aggrieved, to seek judicial review of the Board's action. However, the charging

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[10] *Local 282, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 339 F. 2d 795 (C.A. 2); *Textile Workers Union* v. *National Labor Relations Board*, 294 F. 2d 738, enforced after remand, 315 F. 2d 41 (C.A. D.C.); cf. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board*, 202 F. 2d 546 (C.A. 3), certiorari denied, 346 U.S. 819.

[11] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), contains a similar provision.

[12] Section 102.8, Rules and Regulations and Statements of Procedure, 29 C.F.R. 102.8 (p. 42, *infra*).

party is permitted to participate at the hearing stage not to vindicate his private interest but to assist the General Counsel in protecting the public interest. Frequently the person most familiar with the evidence, his presence insures that the fullest possible record will be developed.[13] But control of the prosecution remains at all times in the hands of the General Counsel, acting in the public interest. Similarly, although the fact that the charging party is a party to the administrative proceeding means that, if the Board dismisses the complaint he can petition under Section 10(f) for court review of that action, this procedure, too, is intended to serve the public interest, not the private interest of the charging party. Where the charging party seeks court review of such dismissal action, he performs the important and salutary function of a "private attorney general." *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated as moot, 320 U.S. 707; see *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477. His petition to review provides the only means, in cases where the Board has not entered a remedial order, for correcting Board errors and insuring that

[13] For the same reason, Section 10(l) of the Act, which authorizes temporary injunctions against certain labor practices *pending completion of the Board proceeding*, provides for the participation of the charging party in the injunction action. A record has not yet been made, and the participation of the charging party may be helpful in the development of it.

the Board's interpretation of the statute is consistent with the intent of Congress.[14]

Save for the charging party's right as an aggrieved person to contest certain Board rulings, a procedure which as we have seen is required in order that the public interest be fully protected, the Act makes the Board's control over an unfair labor practice proceeding as complete after its order is entered as while the proceeding is still pending before it. If the Board finds that an unfair labor practice has been committed and issues a remedial order, only the Board may obtain enforcement of and compliance with that order. Section 10(e) of the Act empowers the Board to petition the appropriate court of appeals for enforcement of the order,[15] but does not require it to do so. Thus, if the respondent voluntarily complies with the order, or if the Board concludes that further proceedings would not be in the public interest, it has discretion not to proceed further; many cases are closed

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[14] The General Counsel of the Board is bound by the Board's decision dismissing the complaint, even if he considers it erroneous. See *Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418 (C.A. 9), certiorari denied, 342 U.S. 815.

[15] Section 10(e) reads:

> The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *.

See also Section 10(d), which provides:

> Until the record in a case shall have been filed in a court * * * the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

in this fashion. If after enforcement proceedings are instituted the Board concludes that further proceedings would not be in the public interest, again it may (with the court's approval) discontinue the proceeding. If the Board's order is enforced by a court decree, only the Board may institute contempt proceedings to insure compliance with the decree. *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261; *Vapor Blast Independent Shop Worker's Ass'n* v. *Simon*, 305 F. 2d 717 (C.A. 7).

Thus the thrust of the NLRA, as of the Federal Trade Commission Act, is to place sole responsibility for enforcement of the law in the hands of a public agency charged to act solely in the public interest, rather than to secure or protect such benefits as may accrue to the charging party from a Board proceeding or order, or a decree of enforcement. The role of the charging party in the administration of the Act is strictly limited to those instances where his participation promotes enforcement of the law in the public interest, as by filing charges, participating as a party in the proceeding before the Board, and appealing Board orders that deny adequate relief.

B. ***Permitting the Successful Respondent to Intervene Is Entirely Consistent With the Labor Board's Exclusive Authority to Enforce the NLRA; Moreover, It Is Supported by Considerations of Fairness.***

Intervention in judicial review proceedings by successful respondents is not likely to impair the Board's effective discharge of its duty to enforce the law in

the public interest; it may even promote it. In the first place, there is little danger that such intervention would unduly delay or hinder the proceeding. To be sure, according the respondent before the Board the status of a party to the review proceeding would permit him to participate in the designation of the record for printing, to file a brief, to present oral argument, and to petition for certiorari in the event of an adverse decision. See *Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338-339. However, records in Board cases usually are relatively short, and it is not likely that the respondent would add substantially to the other parties' designations; even if intervention were denied, the respondent would probably be permitted to file a brief as *amicus curiae* (see R.-18, 8); and permitting the respondent to present oral argument does not necessarily enlarge the total time for argument, for unless the court grants additional time, parties on the same side are usually required to divide the time allocated to that side. See C.A. 7, Rule 21(b); C.A. 2, Rule 23(c). Even more important, since the judicial review proceeding is appellate, intervention does not carry the same potentiality for protraction and complication as in a trial court proceeding in which the intervenor presents testimony, cross-examines witnesses, and makes motions.

Finally, the fact that the successful respondent could seek review in this Court when the Board decided to acquiesce in a court of appeals adverse decision has little practical significance for the Board's control of unfair labor practice litigation. Even if

respondent could not seek certiorari from the first decision of the court of appeals, he could do so later, after an order had been issued against him. A decision of the reviewing court reversing a Board order dismissing a complaint does not terminate the case. The case is returned to the Board for further proceedings, which normally result in entry of a second order. If as is usually the case (see p. 24, *infra*) the second order is affirmed by the reviewing court, the respondent is then entitled to seek review in this Court. Thus, whether or not a successful respondent is permitted to intervene in the first judicial review proceeding affects only the time at which he may file a petition for certiorari.

Permitting such intervention not only does not retard, but indeed advances, the objectives of the NLRA, by accelerating final resolution of the controversy. If intervention is permitted, and the court reverses the Board's order dismissing the complaint, respondent does not have to wait for a subsequent proceeding before deciding to seek further review, but can make that decision at the conclusion of the first review proceeding. If respondent decides to acquiesce in the court's ruling, or if he rejects the ruling but this Court denies his petition for certiorari, it is likely he will then stipulate to the entry of an order against him, thereby obviating the need for lengthy supplemental Board and court proceedings. Permitting the successful respondent to intervene thus furthers one of the Act's basic objectives, the prompt resolution of labor disputes.

There is also a question of fairness to the respondent. If intervention by the successful respondent were not allowed, then in the event that the Board's order dismissing the complaint was set aside and the Board decided not to contest the court's action further, he would have to overcome a substantial obstacle in any subsequent review proceeding. The first court decision, though not legally binding upon respondent, is likely as a matter of *stare decisis* or comity to be followed in any subsequent proceeding to review the Board's post-remand order against him. For example, No. 18 involves only the legal issue whether a fine imposed by a union against its members for violating union rules constitutes restraint and coercion within the meaning of Section 8(b)(1)(A) of the Act. If the court of appeals concluded, contrary to the Board, that such a fine was barred by the section, and the Board acquiesced in that ruling, the Board would accept the court's remand and proceed to enter an order against the union requiring it to cease and desist from levying the fine. The union would have an opportunity to contest this order in a subsequent proceeding brought under Section 10(e) or (f) of the Act, but, as a practical matter, would be limited to urging the court to reconsider its prior views of the reach of Section 8(b)(1)(A).[16] To be sure, if the

[16] This is not always so, for courts of appeals sometimes remand proceedings to the Board to take additional evidence or to reconsider its decision in the light of new principles enunciated by the court. In those circumstances, there is a greater opportunity for the respondent to resist the entry of a subsequent order against him. See, *e.g.*, *Greco* v. *National*

court of appeals adhered to its earlier conclusion and enforced the new order which the Board entered against the union, the latter could petition this Court for certiorari. But such review is, of course, purely discretionary with the Court; and in any event the union would not have had the opportunity normally afforded a litigant to present his position to the court of first resort before its views have crystallized. But see *Insurance Agents'* v. *National Labor Relations Board*, 260 F. 2d 736 (C.A. D.C.).[17]

C. *Permitting the Successful Charging Party to Intervene Would Seriously Interfere With the Efforts of the Board to Enforce the NLRA in the Public Interest.*

The situation presented in No. 53, that of the successful charging party, requires a different conclusion

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Labor Relations Board, 331 F. 2d 165 (C.A. 3); *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116 (C.A. 2); *Local 152, Teamsters* v. *National Labor Relations Board*, 58 LRRM 2285 (C.A. D.C.).

[17] The analysis whereby we conclude that the successful respondent should be permitted to intervene is supported by the analogy of Rule 24(b) of the Federal Rules of Civil Procedure (permissive intervention), which provides in part that "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In applying this provision, the court balances the inconvenience and delay which will follow if intervention is granted against the harm to the person seeking intervention if it is denied. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142; *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass.); 4 Moore, *Federal Practice*, Par. 24.10 (2d ed., 1963). Cf. 3 Davis, *Administrative Law Treatise*, § 22.08, p. 241 (1958).

from that urged above for No. 18, the case of the successful respondent. In No. 53 the Board, upon charges filed by the union (petitioner in this Court), found that the employer had refused to bargain, in violation of Section 8(a)(5) of the Act, and entered a remedial order. The employer petitioned to review this order; the Board cross-petitioned to enforce it; and the union sought to intervene in the proceeding to help the Board secure enforcement. Denying intervention in this situation creates no danger that, in the event the Board's order is reversed, the applicant for intervention will find it difficult to resist entry of a remedial order against him, as in the case where the successful respondent, rather than the successful charging party, is the applicant. To be sure, the successful charging party may lose whatever benefit he might derive from the existence of a remedial order against the respondent. But it is not the function of Labor Board proceedings to confer, as such, benefits on private parties. As the Second Circuit pointed out (R.-53, 18-19): "Normally a charging party has no 'claim' of any sort apart from that which the Board elects to bring on his behalf * * *. However deeply he may be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940), holds that he does not have any legal 'interest' since the purpose of the Labor Act is simply to enforce public rights."

The interest of the charging party in securing enforcement of a remedial order against the respondent (which is not an interest protected by the Act) must

yield to the Act's overriding goal of enforcement exclusively in the public interest. The consequences of permitting the successful charging party to intervene in the review proceeding (rather than confining him to the status of *amicus curiae* (see R.-53, 22)) would be two: to enable him to petition for certiorari in the event that the court of appeals' decision was adverse and the Board decided not to seek further review; and to block the Board and the respondent from discontinuing the court of appeals proceeding prior to the court's decision without the charging party's consent. These consequences would subvert the public character and objectives of Labor Board litigation.

The design of the Act is to make the public interest controlling at every stage of an unfair labor practice proceeding. Thus, as we have seen, the General Counsel is not required to proceed on a charge; if he does, either he or the Board may thereafter discontinue the proceeding even over the opposition of the charging party; should the Board issue an unfair labor practice order, it may decide not to seek enforcement thereof; and even if it does and obtains an enforcement decree, it alone decides what steps should be taken to secure compliance with that decree. The reasoning that sustains the agency's broad discretion in these instances also leads to the conclusion that the Board, without limitation by the charging party, should be empowered to withdraw a case from the court of appeals or to decline to seek certiorari from an adverse decision. While "the energy already spent and the disharmony promoted are beyond recall, the

public interest as viewed by the Board may yet dictate that the conflict proceed no further; and *Amalgamated Util. Workers*, which was itself concerned with post-decision rights of the charging party, makes the public interest controlling" (R.-53, 21).

To illustrate, suppose that after the Board has filed an enforcement petition the respondent decides voluntarily to comply with the Board's order, and the Board, weighing the likelihood of a repetition of the illegal conduct against the time and expense of litigating to obtain a formal court decree and the prospects of losing, concludes that it would effectuate the policies of the Act to accept the settlement and withdraw the petition to enforce; if the charging party was a party to the court proceeding and opposed this course, he could conceivably force a continuation of the proceeding. Cf. 28 U.S.C. 2323; 5 U.S.C. 1038. Or suppose that after the Board has filed a petition to enforce its order, this Court enters a decision in another case which the Board believes casts doubt upon the validity of the principle applied in the enforcement case, or at least suggests that it would be advisable for the Board to obtain additional evidence and make additional findings; if the charging party was a party to the enforcement proceeding and disagreed as to the effect of the intervening decision, it is possible that he could defeat the Board's efforts to obtain a remand and thus force the litigation to continue in a posture which the Board deemed unfavorable. Or suppose that the Board obtains an adverse ruling in the enforcement case and decides not to seek certiorari because the issue, although important, is

not presented in a good factual setting; if the charging party was a party to the proceeding, he would be able to seek certiorari nonetheless, and, if certiorari was granted, the Board would be forced to defend its position in what it regarded as an unsuitable vehicle.[18]

As these examples show, the public interest in the effective prevention of unfair labor practices and the prompt and harmonious settlement of labor disputes may, when a decision must be made on whether to compromise a proceeding pending in the court of appeals, or on whether to seek review in this Court of an adverse court of appeals decision, diverge from the private interest of the charging party, which is simply to secure the maximum remedial order against the respondent. To permit the charging party to intervene in the judicial review proceeding would mean that he could block settlements between the Board and respondents fairly designed to end a labor dispute immediately, without further litigation, and on terms

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[18] The fact that the Board itself had not petitioned for certiorari might, of course, make it more difficult for the charging party to obtain further review. But the Board's failure would not necessarily insure the defeat of the charging party's petition. For, by hypothesis, the issue presented would be important and the Board would be in agreement with the legal position asserted by the charging party. It would therefore be difficult for the Board flatly to oppose his petition.

As pointed out pp. 22-23, *supra*, permitting the respondent to intervene in the situation presented in No. 18 does not entail any diminution of the Board's control over the power to petition for certiorari. For the respondent would in any event be able to seek certiorari with respect to the order issued against him following the first court proceeding.

fully adequate to protect the public interest. It would mean that the charging party could seek review in this Court under circumstances where the risk of an unfavorable decision was unnecessarily great. It would mean, in short, that a private party would be able to substitute his discretion for that of the Board in a range of crucial strategic decisions with respect to the administration of the NLRA, diverting the course of Labor Board cases in their appellate stages for his private gain. Not only is such a result manifestly inconsistent with the design of the Act, and contrary to *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261; it would create a very substantial practical problem, since the Board has by far the heaviest burden in judicial review proceedings of any federal administrative agency.[19]

Petitioner in No. 53 argues that to deny the successful charging party the right to intervene in the judicial review proceeding would be anomalous, since if the Board had ordered the complaint dismissed, the

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[19] In 1964, the Board participated in 416 appellate review proceedings. The combined total of such proceedings for all of the other federal boards and commissions was 567 (almost half of this total being accounted for by Tax Court matters). *1964 Annual Report of The Administrative Office of the United States Courts*, 208. See Appendix B, *infra*, tabulating the appellate workloads of the various agencies. More than 90 percent of the appeals from Board orders involve remedial (rather than dismissal) orders. This is some indication of the practical significance of permitting intervention by successful charging parties in court of appeals review proceedings. In addition, permitting such intervention could well result in substantially increasing this Court's already very substantial burden of petitions for certiorari in Labor Board matters.

charging party would have been entitled to appeal the Board's order (Pet. 5-6). There is no anomaly. If the complaint is dismissed, giving the charging party a right to appeal is the only way to insure that the legal soundness of the Board's action can be reviewed by a court. But if the Board enters a remedial order, it may petition the court to enforce the order, or the respondent may appeal the order or, by refusing to comply with it, compel the Board to seek enforcement. Moreover, the provision that the charging party may appeal if the Board fails to order adequate relief serves the salutary function of compelling the Board to enforce the Act vigorously. But there is no need for a "private attorney general" (see p. 19, *supra*) where—as in the case of the successful charging party who seeks to intervene in the court of appeals in order to help defend (rather than contest) the Board's order—the Board has *not* failed to issue an adequate remedial order. By hypothesis in the situation presented in No. 53, the Board *has* issued such an order. It has thereby evinced a determination to enforce the law vigorously. Surely the Board in such a case can be depended on to take all steps consistent with the public interest to assure that its own order becomes final and effective, and is not set aside or abandoned.[20]

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[20] Similarly, there is no anomaly in denying the charging party the status of party in the judicial review proceeding, while—as the Board does—giving him such status in the administrative proceeding. The fact that persons may be parties to the administrative proceeding does not automatically

Petitioner also argues that, where a court of appeals that denies intervention to a successful charging party reverses the Board's remedial order, the subsequent Board order dismissing the complaint pursuant to the court's mandate is appealable by the charging party, and hence that intervention should be allowed in the first judicial review proceeding to prevent disorderly and redundant judicial review (petition for certiorari, No. 53, p. 9). The premise of this argument is incorrect. The rationale of permitting the charging party to appeal a Board order dismissing the complaint is that otherwise there is no way to test the validity of the order in a court of appeals. That rationale fails completely where the order dismissing the complaint is pursuant to a court of appeals' mandate following its review of the Board's remedial order. Section 10(f) of the Act surely would not be interpreted to permit an appeal by the charging party in these circumstances. So clear is this that

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make them parties to the judicial review proceeding. See *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 267 F. 2d 169, 170 (C.A. 1), certiorari denied, 361 U.S. 863; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 342 (C.A. 1). A review or enforcement proceeding under Sections 10(f) and (e) of the Act is not the equivalent of an appeal of the entire Board proceeding. Section 10(f) restricts the review proceeding to a controversy between the Board and the person aggrieved by its order. Similarly, Section 10(e) restricts the enforcement proceeding to a controversy between the Board and the person against whom its order is directed. There are also practical reasons which justify permitting the charging party to intervene before the agency but which are not applicable in judicial review proceedings. See pp. 8-9, 19-20, *supra*.

we know of no case in which a charging party has ever attempted to appeal from a Board order dismissing the complaint pursuant to the reviewing court's mandate.

Finally, the Second Circuit (R.-18, 19, n. 1) noted that "A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice." Petitioner in No. 53 claims for the first time in this Court that "there is the most direct relationship between the unfair labor practice issue under review in the court below and the Union's contractual rights" (petition for certiorari, No. 53, p. 8, n. 3). We think this Court should not consider the issues involved in petitioner's belated claim that the judicial review proceeding might determine its rights under the contract, since this claim was not made in petitioner's petition for intervention (R.-18, 9-13) or considered by the Second Circuit. In any event, that facts supporting an unfair labor practice charge may also support a private contract claim lends no support to the position that the charging party should be permitted to intervene in the unfair labor practice proceeding. The charging party's private contract claim would not be foreclosed by a court of appeals decision ordering the unfair labor practice complaint dismissed, any more than a complaining party in an FTC proceeding would be foreclosed in the assertion of a private tort claim by a court of appeals decision finding that no violation of the FTC Act had been committed. While

there is an overlapping between conduct subject to the Board's jurisdiction and that which is actionable in the courts by virtue of Section 301 of the Labor Management Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), the rights and remedies under these two bodies of law remain distinct. Certainly conduct could violate a collective bargaining contract and be actionable under Section 301 although it was found not to violate the NLRA.

III

Intervention in Judicial Review Proceedings of Other Federal Agencies Involves Different Factors and Considerations; A Rule Uniformly Applicable to All of the Agencies Would Not Be Appropriate.

In Appendix C, *infra*, we summarize the practice of other federal agencies with respect to intervention in judicial review proceedings by persons not aggrieved by the agency's order. The practice of some agencies, unlike the Labor Board, is governed by specific statutory provisions on intervention. Other agencies have, like the Labor Board, derived their practice on intervention not from a specific provision of the statute they administer but from the design and purpose of the statute as a whole. In either case, no agency supports intervention by the charging party in proceedings that involve prosecutions for past violations of a statutory provision, where the agency acts only to vindicate public rights. Thus, under the Federal Trade Commission Act—the closest parallel to, and the model for, the NLRA (see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 268-269, and pp. 13-14, *supra*), it has never

been suggested that the complainant to the agency has a right to intervene in a proceeding to review the Commission's order.

Other agencies have consented to intervention by persons in an analogous position to the successful charging party before the Labor Board, but only in proceedings that cannot be characterized as exclusively intended to vindicate a public interest—proceedings to set future rates, or grant or deny valuable privileges or franchises, or to vindicate private rights (as under the Interstate Commerce Act; see p. 13, *supra*). In some cases, the intervenor in such proceedings seeks to uphold agency action that gives him a direct economic benefit (*e.g.*, a rate reduction or an award of a license or certificate). In other cases (*e.g.*, where he has opposed a rate increase or the grant of a license or certificate to another), the intervenor stands to pay higher rates or to lose a competitive advantage if the agency action is reversed. The protection of these private interests may well justify a more liberal intervention policy than would be warranted under the National Labor Relations Act, which is not designed to protect such interests. The practices of other agencies with respect to intervention should not be controlling here for the additional reason that the other agencies have many fewer appellate proceedings (see n. 19, p. 30 *supra*, and Appendix B, *infra*). To an agency that has only, say, a dozen such proceedings every year (instead of more than 400, as in the case of the Labor Board), the question whether to permit intervention by an interested but not aggrieved

person may have little practical importance, and in consequence the agency may not have focused on the legal and policy questions involved in applications for intervention by such persons. But, we have seen, this is a question of substantial practical significance to the Labor Board.

We believe that the differences in the mandates (and also in the volume) of appellate litigation by the federal administrative agencies are too great to justify the Court either in looking to the practices of other agencies as the basis for formulating a rule to guide intervention in judicial review proceedings in Labor Board cases, or in formulating a uniform rule to guide intervention in judicial review proceedings in all federal administrative matters. This is an area where diversity of practice is proper and unavoidable.

CONCLUSION

The judgment in No. 18 should be reversed, and that in No. 53 should be affirmed.

Respectfully submitted.

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AUGUST 1965

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

Sec. 3. * * *

* * * *

(d) There shall be a General Counsel of the Board, who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

* * * *

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon

such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * * *

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional

evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to

make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure (29 CFR 102.—), are as follows:

Sec. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 102.9 *Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section

102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.

APPENDIX B

LITIGATION INITIATED IN THE COURTS OF APPEALS BY BOARDS AND COMMISSIONS [1]

	Fiscal Years						
	1958	1959	1960	1961	1962	1963	1964
Boards and Commissions, Total	625	606	737	846	1,024	1,141	983
Tax Court of the U. S.	253	204	203	218	236	363	264
Civil Aeronautics Board	9	23	20	23	34	30	23
Federal Communications	53	35	34	34	33	70	40
Federal Power Commission	31	39	62	42	90	59	56
Federal Trade Commission	21	22	29	29	29	49	49
NLRB	222	254	348	425	418	445	416
Secretary of Agriculture	4	3	4	2	5	1	3
Securities and Exchange	10	8	10	15	4	14	7
Board of Tax Appeals (D.C.)	10	6	2	3	11	7	21
Immigration and Naturalization	—	—	—	—	105	36	40
All Other Boards and Commissions	12	12	25	55	59	67	64

[1] The Annual Report of the Director of the Administrative Office of the U. S. Courts, Fiscal Year 1964.

APPENDIX C

1. Agencies which have specific statutory provisions respecting intervention in judicial review proceedings

Most cases involving judicial review of orders of the Federal Communications Commission are brought under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b), which, *inter alia*, permits any person whose application for a construction permit or station license has been denied by the Commission to appeal to the court of appeals. Section 402(e), 47 U.S.C. 402(e), provides that "any interested person" may intervene in that proceeding, and that "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party." The Commission has interpreted Section 402(e) as providing for intervention only by persons who would be aggrieved by a reversal or modification of the Commission's order, and this usually would be the person receiving the license grant that the appellant is seeking to upset. Accordingly, the Commission has not opposed intervention by such persons even though they are "on the Commission's side." However, it has successfully opposed the efforts of persons claiming aggrievement from the Commission's order to intervene in a review proceeding brought by another aggrieved person, on the ground that they have standing to file their own petition to review the Commission's order.

Review of other Commission orders — generally, those entered in rule-making proceedings—is governed by the provisions of the Judicial Review Act of 1950 (the Hobbs Act), 5 U.S.C. 1031-1042. This Act also governs (see 5 U.S.C. 1032) the review of

orders by the Secretary of Agriculture under the Packers and Stockyard Act, 1921, and the Perishable Agricultural Commodities Act, 1930; by the Federal Maritime Commission under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933; and by the Atomic Energy Commission under the Atomic Energy Act of 1954. Section 4 of the Hobbs Act (5 U.S.C. 1034) provides that "Any party aggrieved by a final order" may "petition to review such order." And, Section 8 (5 U.S.C. 1038) provides:

> * * * The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.

Under this broad provision, both the successful party before the agency and any party aggrieved by its action would be entitled to intervene in the review proceeding, and the agencies involved have not opposed such intervention. See *Producers Livestock Marketing Ass'n* v. *United States*, 241 F. 2d 192, 194 (C.A. 10), affirmed, *sub nom. Denver Stock Yard* v. *Livestock Ass'n*, 356 U.S. 282.

Intervention in proceedings to review orders of the Interstate Commerce Commission are governed by a comparable statutory provision, 28 U.S.C. 2323. Accordingly, the Commission has consistently taken the position that any party in interest in the proceeding before the Commission is entitled to intervene in a judicial review proceeding, as either a party plaintiff or a party defendant. See *Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519.

Judicial review of orders of the Civil Aeronautics Board is governed by the Federal Aviation Act of 1958, 49 U.S.C. 1301, which permits "any person disclosing a substantial interest in such order" to petition for review in the court of appeals (49 U.S.C. 1486). That Act further provides (49 U.S.C. 1489) that in such proceeding:

> * * * it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration * * *.

The Civil Aeronautics Board has therefore not opposed the intervention of persons who have benefited from the Board's order, provided they had a sufficient interest to and did intervene in the administrative proceeding, *e.g.*, competitors of a carrier to whom a route has been denied. See Memorandum for the Civil Aeronautics Board, *In the Matter of the Petition of Eastern Air Lines, Inc.*, Nos. 720, 766, October Term, 1963. Cf. *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 190 F. 2d 340 (C.A. 9). However, the Board has successfully opposed applications for intervention on the part of persons aggrieved by its order, on the ground that intervention should not be substituted for a petition for review.

2. Agencies whose statute is silent respecting intervention in court review proceedings

Under the statutes administered by the Federal Power Commission—the Federal Power Act and the Natural Gas Act—a person "aggrieved" by a final order may institute a court review proceeding, provided he has first made, and the Commission has denied, a timely application for rehearing. 16 U.S.C. 825*l*(b); 15 U.S.C. 717r(b). The statutes are silent on the question of what other parties may intervene in the review proceeding. The Commission usually consents to petitions to intervene by persons other than the person aggrieved by its order, if they were parties to the proceeding before the Commission, and the courts have generally granted intervention. But see *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 342 (C.A. 1).

Under the Mineral Leasing Act (30 U.S.C. 226), the Secretary of the Interior is authorized to grant oil and gas leases on public lands. Judicial review of his decision is obtained by a mandamus action in the district court brought against the Secretary by an unsuccessful applicant or the party whose mining entry has been declared invalid. The applicant for intervention is usually the successful party who obtained the lease or mining claim. The government has taken a neutral position with respect to his right to intervene, and the courts, applying Rule 24 of the Federal Rules of Civil Procedure, have generally permitted intervention. See *Wright* v. *Paine*, 289 F. 2d 766, 767, n. 1 (C.A. D.C.).

Under the Bank Holding Company Act (12 U.S.C. 1841), the Federal Reserve Board is authorized to approve applications for the formation of a holding company to acquire the stock of a bank. The statute

permits the "party aggrieved" by the Board's action to petition the court of appeals for review of the Board's order (12 U.S.C. 1848), but contains no provision respecting intervention by other persons. The aggrieved party is usually a competitor of the bank whose application the Board approved. Where an aggrieved party petitions for review and the successful applicant seeks to intervene in the court proceeding, the Board has not opposed such intervention and it has been granted.

Under the Public Utility Holding Company Act (15 U.S.C. 79b), the Securities and Exchange Commission is empowered to determine whether a company is a holding company within the meaning of the Act and thus subject to its registration requirements and security restrictions (see 15 U.S.C. 79b(7)). Any person aggrieved by an order issued by the Commission may obtain review of such order in the court of appeals (15 U.S.C. 79x).* See *American Power Co.* v. *Securities and Exchange Commission*, 325 U.S. 385. The statute is silent on the question whether other persons may intervene in the proceeding. The Commission has never opposed intervention by any participant before the Commission.**

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* There are comparable review provisions under the Securities Act of 1933 (15 USC 77a), the Securities Act of 1934 (15 U.S.C. 78y), and the Investment Company Act of 1940 (15 U.S.C. 80a-42).

** Proceedings to enforce its order or to enjoin violations of the statute are brought by the Commission in the district court (15 U.S.C. 79y), where Rule 24 of the Federal Rules of Civil Procedure would govern intervention. The Commission determines its position on intervention in these proceedings on a case-by-case basis.

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SUPREME COURT OF THE UNITED STATES

Nos. 18 AND 53.—OCTOBER TERM, 1965.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, Local 283, Petitioner, v. Russell Scofield et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, UAW, AFL–CIO, Petitioner, v. The Fafnir Bearing Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[December 7, 1965.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The two cases before us present converse sides of a single question—whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings.

In No. 18 (*Scofield*), the Union Local was charged by four individual employees with violations of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* (1958), for fining certain Union members for exceeding incentive pay ceilings set by the Union. The General Counsel of the Board issued a complaint. After a full hearing, the Board dismissed the complaint, 145 N. L. R. B. 1097. The individual employees then sought review in the Seventh Circuit.

The General Counsel filed an answer supporting the decision. At this point, the Union filed a timely motion of intervention, alleging that it would be directly affected should the appellate court set aside the Board's decision and direct the entry of a remedial order against it. Neither the individual employees nor the Board opposed intervention. A division of the Seventh Circuit denied the motion to intervene, but authorized the Union to file a brief as *amicus curiae* without leave to participate in oral argument. The Union sought review here, and we granted certiorari to review the denial of intervention because of the importance of the issue and the conflict among the Circuit Courts, 379 U. S. 959. Further proceedings were stayed pending the completion of our review.

In No. 53 (*Fafnir*), the Local filed unfair labor practice charges against The Fafnir Bearing Company. The charging party alleged that the company had violated its statutory bargaining obligation by refusing to permit the contracting Union to conduct its own time studies of job operations in the plant. The Union allegedly needed to conduct these studies to ascertain whether it should proceed to arbitration. The General Counsel issued a complaint, a hearing was held, and the Board entered a cease-and-desist order against the company, 146 N. L. R. B. 1582. The company petitioned for review in the Second Circuit, and the Board filed a cross-petition for enforcement. The Union—the successful party before the Board—moved to intervene, alleging numerous grounds in support. Both the company and the Board opposed intervention. The Second Circuit denied the motion, although cognizant of the difficulties of the problem, and authorized the Union to file an *amicus* brief. 339 F. 2d 801. We granted certiorari, 380 U. S. 950, and consolidated *Fafnir* with *Scofield* in order to consider both facets of the intervention problem.

We hold that both the successful charged party (in *Scofield*) and the successful charging party (in *Fafnir*) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders. We think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision.

A threshold question concerns our jurisdiction to grant certiorari. Under § 1254 (1) of the Judicial Code,[1] only a "party" to a case in the Court of Appeals may seek review here. In both these cases, the Union seeking certiorari was denied intervention and relegated to the status of an *amicus curiae*. Because an *amicus* is not a "party" to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals, *In re Leaf Tobacco Board*, 222 U. S. 578, 581; *Ex parte Cutting*, 94 U. S. 14, 20–22. In view of our decision herein, we think that § 1254 (1) permits us to review the order denying intervention. See *Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519.

I.

Congress has made a careful adjustment of the individual and administrative interests throughout the course of litigation over a labor dispute. The Labor Act does not, however, provide explicitly for intervention at the appellate court level. Section 10 (f) of the Act,

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[1] Section 1254 (1), 62 Stat. 928, 28 U. S. C. § 1254 (1) (1958), provides:

". . . cases in the courts of appeals may be reviewed by the Supreme Court:

"(1) By writ of certiorari granted upon the petition of any party to any civil . . . case before or after rendition of judgment or decree."

29 U. S. C. § 160 (f), serves as our guide, even though it is silent on the intervention problem. It states, in pertinent part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

Similarly, no specific standards govern the propriety of intervention in Labor Board review proceedings. The Rules of the Courts of Appeals typically provide: "A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene." [2]

Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio* v. *Commission*, 316 U. S. 4, 11. Of course, in considering the propriety of intervention in the Circuit Courts, our discussion is limited to Labor Board review proceedings. Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency.

In some instances, the words of the statute themselves elicit an answer. When the Board enters a final order

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[2] Second Circuit Rule 13 (f); Seventh Circuit Rule 14 (f). The other circuits which provide for intervention have substantively identical rules: First Circuit Rule 16 (6); Third Circuit Rule 18 (6); Fourth Circuit Rule 27 (6); Sixth Circuit Rule 13 (6); Eighth Circuit Rule 27 (f); Ninth Circuit Rule 34 (6); Tenth Circuit Rule 34 (6); District of Columbia Rule 38 (f).

against the charged party, it is clear that the phrase "any person aggrieved" in § 10 (f) enables him to seek immediate review in the appropriate Court of Appeals. Alternatively, if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a "person aggrieved." A hybrid situation occurs when the Board dismisses certain portions of the complaint and issues an order on others. As to that portion which results in a remedial order against him, the charged party is aggrieved; likewise, the charging party is aggrieved with respect to the portion of the decision dismissing the complaint. Each one is a "party" in a consolidated appeal, and has invariably been granted leave to intervene to the portion of the order on which the Board found in his favor.[3]

Scofield serves as an example of another variant in review proceedings. The unsuccessful charging party to the Board proceedings petitioned for review, and the successful charged party wished to intervene. The vast majority of the courts have recognized his right to do so.[4]

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[3] *Darlington Mfg. Co.* v. *Labor Board*, 325 F. 2d 682 (C. A. 4th Cir.), vacated and remanded on other grounds *sub nom. Textile Workers* v. *Darlington Co.*, 380 U. S. 263; *Industrial Union of Marine & Shipbuilding Workers* v. *Labor Board*, 320 F. 2d 615 (C. A. 3d Cir.); *Labor Board* v. *Wooster Div. of Borg-Warner Corp.*, 236 F. 2d 898 (C. A. 6th Cir.); see also *American Newspaper Publishers Assn.* v. *Labor Board*, 190 F. 2d 45 (C. A. 7th Cir.).

[4] *Steelworkers* v. *Labor Board*, 311 F. 2d 135 (C. A. 2d Cir.), reversed on other grounds, 376 U. S. 492; *Local 1441, Retail Clerks International Assn.* v. *Labor Board*, 326 F. 2d 663 (C. A. D. C. Cir.); *Amalgamated Clothing Workers of America* v. *Labor Board*, 324 F. 2d 228 (C. A. 2d Cir.); *Minnesota Milk Co.* v. *Labor Board*, 314 F. 2d 761 (C. A. 8th Cir.); *Great Western Broadcasting Corp.* v. *Labor Board*, 310 F. 2d 591 (C. A. 9th Cir.); *Selby-Battersby & Co.* v. *Labor Board*, 259 F. 2d 151 (C. A. 4th Cir.); *Kovach* v. *Labor Board*, 229 F. 2d 138 (C. A. 7th Cir.). Contra, *Superior Derrick Corp.* v. *Labor Board*, 273 F. 2d 891 (C. A. 5th Cir.), cert. denied, 364 U. S. 816; *Amalgamated Meat Store, Inc.* v. *Labor*

Recognition of intervention rights in this instance is in complete accord with the statements in *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 369, 373, that:

> "While § 10 (f) assures to any aggrieved person the opportunity to contest the Board's order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. . . .
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> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity power, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements. . . ."

To allow intervention to the charged party in the first appellate review proceeding is to avoid "unnecessary duplication of proceedings," and to adhere to the goal of obtaining "a just result with a minimum of technical requirements." Analysis of the Act's machinery in practice so indicates. A decision of the reviewing court to set aside a Board order dismissing a complaint has the effect of returning the case to the Board for further proceedings. This normally results in the Board entering an order against the charged party. From this remedial order, as noted, the charged party is aggrieved and may

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Board, 267 F. 2d 169 (C. A. 1st Cir.), cert. denied, 361 U. S. 183; *Haleston Drug Store, Inc.* v. *Labor Board*, 190 F. 2d 1022 (C. A. 9th Cir.).

seek review. Judicial time and energy is then expended in pursuit of issues already resolved in the first appeal.[5] Moreover, the second appeal could lead to undesirable "circuit shopping" and useless proliferation of judicial effort. Under § 10 (f), an aggrieved person has the option of obtaining review either in the circuit in which he maintains his residence or place of business or in the Court of Appeals for the District of Columbia Circuit. In the second appellate proceeding, he could obtain a hearing in the circuit which did not originally decide the validity of the Board's dismissal of the complaint. Permitting intervention in the first review thus centralizes the controversy and limits it to a single decision, accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes.

Permitting intervention also insures fairness to the would-be intervenor. If intervention is permitted, the parties to the Board proceedings are able to present their arguments on the issues to a reviewing court which has

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[5] There are, of course, cases in which the Court of Appeals will remand to the Board to take additional evidence or to reconsider the order in light of litigational developments. In these cases, there is a greater opportunity for the party originally victorious before the Board successfully to persuade it or the appellate court than in the case in which no additional evidence need be taken. Still, the considerations discussed herein strongly suggest the propriety of intervention in these cases as well, especially since, at the time a motion for leave to intervene is filed, the reviewing court will not be fully apprised of the issues involved in the case.

Then, too, only 12 proceedings in which the Board had entered an order dismissing the complaint and the charging party appealed the dismissal in the Court of Appeals occurred during the 1964 fiscal year. See 29th Ann. Rpt. of the NLRB, p. 201 (Table 19) (1965). In eight of these, the Board orders were affirmed in full. *Ibid.* The small caseload gives further support for the notion that the circuit courts, and the Board, will not be disadvantaged by allowing intervention to the charged party.

not crystallized its views. To be sure, if intervention is denied in the initial review proceeding, the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis* or of comity.[6] See, *e. g.*, *Amalgamated Clothing Workers of America* v. *Labor Board*, 340 F. 2d 309; *Zdanok* v. *Glidden*, 327 F. 2d 944, 949–950, cert. denied, 377 U. S. 934.

Allowing intervention does not affect the discretionary review powers of this Court. One occupying the status of intervenor in the Court of Appeals proceeding may seek certiorari from the decision there, *Steelworkers* v. *Labor Board*, 373 U. S. 908, 376 U. S. 492; *Mine Workers* v. *Eagle-Picher Co.*, 325 U. S. 335, 338–339. Denial of intervention in the initial review proceedings—and the attendant remand to the Board and second appeal to the Court of Appeals—only results in a delay of the time when the disaffected party may seek review here. Should we decide to grant certiorari, the first review would seem

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[6] In the rare instance in which the reviewing court does not abide by these principles, an even more aggravated situation could result. In the second review proceeding, if the now-successful charging party is denied intervention and the appellate court takes a different view of the applicable law, the charging party might later have the opportunity to seek review again as a "person aggrieved." Thus, three or even more review proceedings could be engendered out of the failure to permit intervention at the most convenient stage—the initial review proceeding. Such an incongruous result should not be sanctioned in light of our statement in *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 370, that although "there are two proceedings, separately carried on the docket, they were essentially one so far as any question as to the legality of the Board's order was concerned."

the more propitious time, since all the parties are then before the Court and the dispute has been fully developed without inconvenience to either private party. *Steelworkers* v. *Labor Board*, 376 U. S. 492, affords an apt illustration. The Court of Appeals had permitted intervention to the charged party who sought review from the adverse decision there. We reversed unanimously. The Board itself had not sought certiorari because "the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government [could] properly ask this Court to review." Memorandum for the NLRB, p. 2, filed in connection with the petition for certiorari, No. 89, October Term, 1963. Had the charged party been denied intervention in the Court of Appeals, the decision of the Government not to apply for certiorari—unrelated to the merits of the cause—would have unnecessarily postponed resolution on that important issue.[7]

In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest. The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are neither productive of delay nor do they cause complications in the appellate courts. Appellate records in Labor Board cases

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[7] The Labor Board may also adversely affect the rights of the private parties in other instances. For example, the Board may decide a case and later re-evaluate its position at a time when that case is before an appellate court. The General Counsel, in such a situation, cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned.

are generally complete, and whatever material the charged party may see fit to add to the appendix will not affect the burden in preparation. Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful. The charged party is usually accorded the right as an *amicus* to file a brief on the merits even if denied intervention. Participation in oral argument does not necessarily enlarge the total time allocated, since parties aligned on the same side are usually required to share the time.[8] And, as noted, petitioning for certiorari at this time has the salutary effect of insuring prompt adjudication. Further, if a charged party permitted to intervene decides to acquiesce in the decision or if certiorari is denied by this Court, it is likely that he will then stipulate to the entry of an order against him. This would obviate the need for supplemental agency or court proceedings. On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court.

Finally, an element of fortuity would be injected by the denial of intervention to a successful party in the Board proceedings. When the charged party loses before the Board, he is accorded a statutory right to immediate review and may seek or oppose this Court's ultimate review of the case. If he prevails at the agency level, however, denial of intervention deprives him of the rights accorded a losing party, even though the issue before the

[8] First Circuit Rule 28 (3); Second Circuit Rule 23 (c); Third Circuit Rule 31 (3); Fourth Circuit Rule 15 (3); Fifth Circuit Rule 25 (3); Sixth Circuit Rule 20 (3); Seventh Circuit Rule 21 (b); Eighth Circuit Rule 13 (c); Ninth Circuit Rule 20 (3); Tenth Circuit Rule 20 (3); District of Columbia Rule 19 (c).

Additionally, all the circuits have rules which permit the court to increase the time for oral argument upon a showing of good cause.

reviewing court is identical—whether a remedial order should have been entered against the charged party. These considerations lead us to the assumption that Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before the agency.

Additionally, helpful analogies may be found in the Judicial Review Act of 1950, governing intervention in the Courts of Appeals by private parties directly affected by agency orders,[9] and in the Federal Rules of Civil Procedure.[10] We take these provisions to mean that Congress has exhibited a concern that interested private parties be given a right to intervene and participate in the review proceedings involving the specified agency and its orders.

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[9] Review of Commission orders in general is governed by the provisions of the Judicial Review Act of 1950 (the Hobbs Act), 5 U. S. C. §§ 1031–1042 (1958). The provision regarding appellate court intervention, 5 U. S. C. § 1038, provides as follows:

"The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order . . . ."

[10] The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts. Under Rule 24 (a)(2) or Rule 24 (b)(2), we think the charged party would be entitled to intervene. See *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 505–506; *Textile Workers Union of America* v. *Allendale*, 226 F. 2d 765, 767–768 (C. A. D. C. Cir.).

The Advisory Panel on Labor-Management Relations Law issued a report, S. Doc. No. 81, 86th Cong., 2d Sess. (1960), which contained a statement of policy that "any party to NLRB proceedings should be allowed to intervene in the appellate proceedings," p. 17.

II.

The problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party. Resolution of the problem is no easy matter, and it is understandable that the courts have divided on the issue.[11] Still, we believe that Congress intended intervention rights to obtain.

The Board opposes intervention in *Fafnir*. A charged party may incur a liability on account of an order being entered against him. Fairness to him thus requires that he be allowed to intervene to preclude that possibility. On the other hand, the Board reasons, the charging party stands only to become a beneficiary of an order entered.[12] As such, he is but another member of the public whose interests the Board is designed to serve. The Labor Board is said to be the custodian of the "public interest," to the exclusion of the so-called "private interests" at

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[11] The cases which have permitted intervention usually have not discussed the question, *e. g.*, *Labor Board* v. *Johnson*, 322 F. 2d 216 (C. A. 6th Cir.); *Kearney & Trecker Corp.* v. *Labor Board*, 210 F. 2d 852 (C. A. 7th Cir.), cert. denied *sub nom. Kearney-Trecker Employees, UAW* v. *Labor Board*, 348 U. S. 824; *West Texas Utilities Co.* v. *Labor Board*, 184 F. 2d 233 (C. A. D. C. Cir.), cert. denied, 341 U. S. 939. Contra, *Labor Board* v. *Retail Clerks Assn.*, 243 F. 2d 777, 783 (C. A. 9th Cir.); *Steward Die Casting Corp.* v. *Labor Board*, 132 F. 2d 801 (C. A. 7th Cir.); *Aluminum Ore Co.* v. *Labor Board*, 131 F. 2d 485, 488 (C. A. 7th Cir.).

[12] Cf. Hart and Wechsler, The Federal Courts and The Federal System, 326 (1953):

"Haven't you noticed how frequently the protected groups in an administrative program pay for their protection by a sacrifice of procedural and litigating rights? The agency becomes their champion and they stand or fall by it. Does this phenomenon reflect a disregard or a recognition of the equities of the situation?"

See also Jaffe, The Public Right Dogma in Labor Cases, 59 Harv. L. Rev. 720 (1946).

stake. Support for this view is claimed to be found in our decision in *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940). Also, the Board fears that enabling the intervenor to petition for certiorari from an adverse circuit decision will be inimical to the public interest. We disagree.

In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme.[13] These cases have, to be sure, emphasized the "public interest" factor. To employ the rhetoric of "public interest," however, is not to imply that the public right excludes recognition of parochial private interests. A perusal of the statutory scheme and of the Board's Rules and Regulations is illustrative.

The statutory machinery begins with the filing of an unfair labor practice charge by a private person, § 10 (b); see also, 24 Fed. Reg. 9102 (1959), 29 CFR § 102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party";[14] he may

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[13] *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 258; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194; *Nathanson* v. *Labor Board*, 344 U. S. 25, 27; *Smith* v. *Evening News Assn.*, 371 U. S. 195. See Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485, 528–531 (1940).

[14] The NLRB Rules and Regulations and Statements of Procedure, 29 CFR § 102.8 (1965), afford the charging party this status. The section provides as follows:

"The term 'party' as used herein shall mean . . . any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, *any person filing a charge* or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act. . . ." (Emphasis added.)

call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR § 102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the "public interest" by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress.[15]

And that the charging party may have vital "private rights" in the Board proceeding is clear in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement.[16] Under our decisions in the *Steelworkers Trilogy*, 363 U. S. 564, and *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, the Union could take whatever contractual claim it had to arbitration and from there to a federal court. And while it is true

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[15] For an analysis of the rights of a charging party before the Board, see Comment, 32 U. Chi. L. Rev. 786 (1965). Of course, the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive on the question of appellate intervention. In the first place, the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication. Also, the statistics of the NLRB reveal that over 97% of the unfair labor practice charges are resolved before the circuit court has entered a decree. 29th Ann. Rpt. of the NLRB, pp. 178–179 (Table 7) (1965). This winnowing process diminishes once a case is lodged in the circuit court and falls within our supervisory power over the federal courts. Then, too, manpower and budgetary considerations are of great concern at the administrative level. These factors are not nearly as great when a labor dispute reaches the appellate courts since the Board will invariably appear to defend its order.

[16] In the Board's opinion in *Fafnir*, the charging party's interests were referred to a dozen times as a statutory right of the "private party," 146 N. L. R. B., at 1585–1587.

that the rights and duties under § 301 (a) of the Labor Act are not coextensive with those redressed in Labor Board proceedings, a determination by an appellate court that the Union has no statutory right to conduct its own time studies will surely have an impact upon a later decision by an arbitrator or an appellate court under § 301 (a) on the contractual issue.

In short, we think that the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.[17] Nor do we think that our holding in *Amalgamated Util. Workers*, 309 U. S. 261, casts doubt on these notions. The Court there held that private parties who initiated unfair labor practice charges may not prosecute a contempt action against the charged party in the court which enforces the Labor Board order.[18] In the same case, the private parties had been permitted to intervene in the Court of Appeals when the merits of the Board's decision were at stake, 309 U. S., at 263. We find nothing inconsistent in denying the right of a private

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[17] See *Retail Clerks Local 137* v. *Food Employers Council, Inc.*, — F. 2d —.

[18] The Court placed great weight upon the language and legislative history behind § 10 (a), as it read at that time:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be stablished by agreement, code, law, or otherwise." (Emphasis added.)

The italicized portion of § 10 (a) was deleted in the Taft-Hartley amendments to the Wagner Act in 1947, when Congress added the union unfair labor practice provisions and enacted § 301 (a). While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes. See Report of the Advisory Panel on Labor Management Relations Law, *supra*, n. 10, p. 5.

party to institute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and on the other hand, in permitting intervention in a proceeding already in the court for decision. When the court is to rule on the merits of the Board's order, the Act supports the view that it is the court and not the agency which will define the public interest, see § 10 (d), *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364.

The Board also argues that permitting intervention will adversely affect its tactical or budgetary decision not to bring a case here for review. But the opportunity is open to the Board to advise this Court whether a case that the intervening charging party brings here is an appropriate vehicle to raise important issues. And Congress has entrusted to this Court, rather than the Labor Board, discretionary jurisdiction to review cases decided by the Courts of Appeals.[19]

Many of the considerations which favor intervention in *Scofield* are also pertinent here.[20] Of special note is the capriciousness we would have to ascribe to Congress in refusing to afford the successful party to a Labor Board proceeding an opportunity tantamount to that of the unsuccessful party in persuading an appellate court. The charging party, like the charged party, should not be prejudiced by his success before the agency. Accordingly, we reverse both cases and remand them to the respective courts for further proceedings.

It is so ordered.

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[19] The Board also claims that the charging party, if permitted to intervene, will be able to thwart proposed settlements between the Board and the charged party when the case is in the appellate court. Nothing in the record indicates that this will be the consequence of allowing intervention and we intimate no view on the question.

[20] As in the case of the charged party, disallowing intervention could lead to duplicity in appellate review, "circuit shopping," unfairness to the successful party to the Board proceedings, etc.